Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996	)))))	CC Docket No. 96-128

FIFTH ORDER ON RECONSIDERATION AND ORDER ON REMAND

Adopted: October 17, 2002 **Released:** October 23, 2002

By the Commission:

Page

1. INTRODUCTION

1. In the *Fourth Order on Reconsideration and Order on Remand*[1] in this proceeding, the Commission resolved some of the issues necessary to address the remand of the Commission's *First Report and Order* by the United States Court of Appeals for the D.C. Circuit.[2] This order finishes the work we began in the *Fourth Reconsideration Order* by resolving how monthly per-phone compensation owed to payphone service providers (PSPs) is to be allocated among interexchange carriers (IXCs) and local exchanye carriers (LECs).[3] This order also resolves how certain offsets to such payments shall be handled, the valuation of payphone assets transferred by LECs to a separate affiliate or operating division, and other issues raised by parties in petitions for reconsideration of our *Third Report and Order*[4] and our *Fourth Reconsideration Order*. By completing its work of responding to the remand by the D.C. Circuit, the Commission clears the way for PSPs, LECs and IXCs to resolve per-phone compensation owed for periods as far back as 1996. After many Commission orders, reconsideration petitions, and extensive litigation on these issues, the Commission finally closes a long-open chapter in the history of payphone compensation. In this Order, we provide a measure of finality regarding these questions in a way that most reasonably advances the basic policy directives for the provision of payphone services established by Congress under section 276 of the Telecommunications Act of 1996[5] (the "1996 Act"): (1) promoting a competitive payphone market; (2) ensuring the widespread deployment of payphones for the benefit of the general public; and (3) ensuring that PSPs receive fair compensation for every call made using their payphones.

---

[1] *Implemenrarion of the Pay Telephone Reclassification and Compensarion Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, *Foirrrh Order on Reconsideration and Order on Remand*, 17 FCC Rcd 2020 (2002) (*Fourrh Reconsiderurion Order*).

[2] *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, *Reporr and Order.* 11 FCC Rcd 2054 I (1996) (*First Reporr and Order*); *Order on Reconsideration.* 11 FCC Rcd 21233 (1996) (*First Reconsiderarion Order*), *aff'd in parr and remanded in parr sub nom. Illinois Pub. Telecomm. Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997) (*Illinois*), *clarified on reh'g*, 123 F.3d 693 (D.C. Cu. 1997), *cert. denied sub nom. Virginia State Corp. Comm'n v. FCC.* 523 U.S. 1046 (1998); *see also Second Reporr and Order*, 13 FCC Rcd 1778 (1997) (Second Report and Order), *aff'd in parr and remanded in parr sub nom. MCI v FCC*, 143 F.3d 606 (D.C. Cir. 1998) (*MCI*).

[3] Most of the entities that owe payphone compensation are IXCs. Indeed, in the *First Reporr and Order*, the Commission defined the term "IXC" to include LECs to the extent that LECs carried compensable payphone calls. *Firsr Report and Order*, 11 FCC Rcd at 20584 n. 293. We will generally refer to entities owing compensation as "carriers" in this Order, to avoid any inference that, except as otherwise provided herein, we intend to exclude types of providers other than IXCs.

[4] *Implemenrarion of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunicarions Acr of 1996*, CC Docket No. 96-128, *Third Reporr and Order and Order on Reconsiderorion of the Second Report and Order*, 14 FCC Rcd 2545 (1999) (*Third Reporr and Order*), reconsideration petitions pending, *aff'd sub nom. Americun Pub. Communications Council v. FCC*, 215 F.3d 51 (D.C. Cir. 2000) (*American*).

[5] Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. § 276). The complete text of Section 276 is provided as Appendix A of the *First Report and Order*, 11 FCC Rcd at 20713-14.

II. BACKGROUND

2. The foundation of our authority to regulate per-call and per-phone compensation is section 276 of the Act. which significantly altered the landscape for the provision of payphone service. Prior to the enactment of section 276 in 1996. incumbent LECs recovered the cost of providing payphone services, at least in part, through the inclusion of charges for the recovery of such costs in their intrastate and interstate regulated rate structures. Independent providers of payphone service, however, had no such regulated cost recovery mechanism. To redress this imbalance and level the playing field for the provision of payphones, section 276(b)(1)(B) directed the Commission to prescribe regulations to "discontinue the intrastate and interstate carrier access charge payphone service elements and payments . . . and all intrastate and interstate payphone subsidies from basic and exchange access revenues." The Commission did so in the *First Report and Order*.[6] Section 276(b)(1)(A) of the Act further required the Commission to replace this legacy of cost recovery favoring incumbent LEC providers with a "per-call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone . . . ."

3. The Commission's task in implementing this latter directive is complicated by the fact that there are several different types of calls that may be placed from a payphone and therefore must result in compensation to the owner of the phone pursuant to section 276. First: a payphone user may place a local call for which he deposits money into the phone. The deposited money provides the per-call compensation for such local coins calls, as explained in the *First Report and Order*. Users may also call a toll-free number,[7] dial an access code, or use a pre-paid calling card without placing any money into the payphone. These coinless calls present a different. and more difficult, compensation issue. Because no money is deposited by the caller when making access code, subscriber toll-free or calling card calls, the owner of the payphone does not receive direct compensation for the costs associated with the use of its payphone from the end user, and must thus receive compensation from some other source. Although a "caller pays" system could be technically feasible for these types of calls, section 226 of the Act prohibits the Commission from adopting compensation rules for interstate access code calls that would require advance payment by consumers.[8] We have thus held that the Congressional intent underlying this prohibition, and the express language of section 226, precludes us from implementing section 276 through a "caller pays" system for coinless calls.[9] Accordingly, in the *First Report and Order*, we decided that the "primary economic beneficiary" of the call, the IXC, would be responsible for paying per-call compensation.[10]

4. In that order, we expressed the view that, ultimately, the market should determine the amounts paid for any given call, but recognized that carriers and PSPs did not have equal economic bargaining positions because the Act prohibits PSPs from blocking calls made from their phones.[11] This prohibition obligates the PSP to provide full service to the carrier, but gives the carrier no economic incentive to pay for the service it receives. There have also been technical hurdles to ensuring per-call compensation. At the time section 276 was enacted into law, many telephone companies lacked the

---

[6] *First Report and Order*. 11 FCC Rcd at 20632-34, ¶¶ 180-87.

[7] Also referred to in previous orders as "subscriber 800" calls. *See id.* at 20549 & n. 35. As dialing prefixes other than "800" are increasingly used for toll-free calls, we will refer to these calls as "toll-free" or "subscriber toll-free" calls in this Order.

[8] *First Report and Order*, 11 FCC Rcd at 20585, ¶85.

[9] *Id.*; *Second Report and Order*, 13 FCC Rcd at 1844, § 162; *Third Report and Order*, 14 FCC Rcd at 2565, ¶ 42 and 2597. ¶¶ 114-16 (". . . we find that the statutory language and legislative history indicate Congress's disapproval of a caller-pays methodology"); *see also* S. Rep. No. 101-439 at 20 (1990).

[10] *First Report and Order*, 11 FCC Rcd at 20584, ¶ 83, 20586, ¶ 86

[11] *Id.* at 20567, ¶ 49.

necessary hardware and software to track calls in order to determine who owed what money to whom. **At** this point, the vast majority of payphones now transmit the appropriate coding digits.”

5. **In** the *Firs! Report and Order* and subsequent orders issued over the following **six** years, we set forth various “default” compensation rates to govern dial around compensation in the absence of an agreed upon rate, acknowledging that, in practice, the default rate is the de facto rate in the industry given the lack of economic incentives for parties to negotiate. Our first two rates were reversed by the D.C. Circuit. and the third **one** was upheld.” The different rates that have prevailed at different times give rise to two separate periods of payphone compensation.

6. We will refer to the first period as the “Interim Period,” which began on the effective date ***of*** the *Firs! Report and Order*. November 7, 1996, and ended on October 6, 1997. Because call tracking did not then exist, the Commission ordered compensation to be paid on a per-phone, rather than a per-call basis. We calculated that 131 calls were placed from the average payphone per-month, and each PSP was entitled to a default rate of 35 cents per-call. This yielded a per-phone compensation of $45.85 **per**-month, to be paid collectively by the carriers. The Commission determined that all carriers with toll revenue exceeding $100 million would pay a share of the compensation, pro rated by the ratio of their toll revenue to total industry revenue.

7. In *Illinois,* the D.C. Circuit reversed three critical aspects of that regime. First, it held that the 35 cent compensation rate was arbitrary; second, it held that it was arbitrary to exclude smaller carriers from responsibility for paying compensation; and third, it held that toll revenues were not a rational ground on which to base the pro rata per-company compensation responsibility.[14] Thus, the D.C. Circuit required the Commission to establish an appropriate per-call compensation rate going forward, and also required the Commission to reexamine aspects of its methodology for per-phone compensation during the Interim Period.

8. On remand, the Commission addressed its first charge by establishing a new per-call rate of 28.4 cents.” We have referred to the period during which that rate was in effect as the “Intermediate Period,” beginning on October 7, 1997 and ending on April 20, 1999. In *MCI*, the D.C. Circuit held that the 28.4 cent rate was arbitrary. The court did not vacate the rate, but simply remanded for further proceedings.[16] The 28.4 cent rate was thus in effect, and the Intermediate Period lasted, until a new per-call rate of 24 cents was calculated in the *Third Reporr and Order*. The D.C. Circuit upheld this rate in *APCC*.[17] With regard to the Intermediate Period. the *Third Report and Order* determined that the per-call compensation rate should have been 23.8 cents per-call, derived by reducing the 24 cent rate by 0.2 cents for the cost of FlexANI technology, which was not payable during the Interim and Intermediate Periods.” The *Third Reporr and Order* thus required PSPs to refund to carriers the difference between the 28.4 cents

[12] *See SBC **Requesr** to Extend Limited **Waiver** of Coding Digit Requirements*, CC Docket 96-128, Order (Dec. 9, 1998); *Third **Reporr** and **Order,*** 14 FCC Rcd at 2553; *see also Implementation of the **Pay Telephone** Reclassification ond **Compensation** Provisions of the Telecommunications Act **of** 1996,* CC Docket **No.** 96-128, Order, 14 FCC Rcd 836 (Network Serv. Div. 1998) (waiver denials).

[13] **See** *Illinois*, 117 F.3d at 564; *MCI,* 143 F.3d at 609; *Americun.* 215 F.3d at 58.

[14] *Illinois*, 117 F.3d at 565.

[15] *Second Report and Order,* 13 FCC Rcd at 1830, ¶ 121, 1845, ¶ 165.

[16] *MCI*, 143 F.3d at 606, 609.

[17] ***Americun,*** 2I5 F.3d at 58.

[18] *Third Report and Order,* 14 FCC Rcd at 2635.

actually paid and the proper rate ofcoinpensation during the Intermediate Period of23.8 cents. Several parties have asked for reconsideration o f that conclusion.[19]

9. As noted above, the ***Fourrh Reconsiderarion Order*** resolved certain issues relating to Interim Period compensation. Specifically, the Commission determined that the per-phonc per-month compensation rate would be $33.892, calculated by taking the per-call compensation rate of 24 cents set in the ***Third Report and Order,*** deducting cost components o f 0.2 cents for FlexANI and 0.9 cents for interest payable on account of regularly delayed payments. and then multiplying the resulting 22.9 cent rate by a revised estimate o f 148 compensable calls per-phone per-month.'" The Commission reserved resolution o f how payment could be allocated to carriers pending receipt of further information." Parties filed petitions for reconsideration of the decisions reached in the ***Fourth Reconsiderution Order.***

III. DISCUSSION

10. Parties have raised a number o f questions regarding the calculation and resulting amount of per-phone compensation, as well as the mechanics of rendering payment, in petitions for reconsideration o f the ***Third Report and Order*** and the ***Fourth Reconsiderarion Order.*** Thus, even if we resolved the issues remanded by the D.C. Circuit, we would be unable to provide any sort o f finality to the industry unless we also resolved these other pending issues. By resolving all o f these issues in a single comprehensive order, we provide this finality and create the preconditions necessary for carriers to render compensation to PSPs that have been underpaid, and for PSP in turn to provide compensation to carriers that have overpaid.

11. First, we dispose o f a number o f pending petitions for reconsideration o f decisions that are directly relevant to establishing a fair per-phone compensation rate. Specifically, we (I) deny those petitions that ask us to change the per-call compensation rate and the average number ofsubscriber toll-free and access code calls. (2) deny the Regional Bell Operating Company ("RBOC") Coalition petition asking us to include I+ calls as compensable calls. (3) deny the Colorado Payphone Association's ("CPA's") petition asking us to reconsider the 24 cent per-call compensation rate, (4) reconsider our drcision regarding the removal o f the interest rate component from the per-call compensation rate for the purpose o f calculating compensation owed for the Interim and Intermediate Periods and (5) recalculate the per-call compensation rate for purposes of calculating per-phone compensation for the Interim Period and the Intermediate Pcriod.

12. Second, having disposed o f pending questions regarding the underlying compensation rare, we set forth a methodology for allocating per-phone compensation among carriers, and thus complete the work we started in the ***Fourth Reconsiderarion Order.*** In doing so, we also explicitly deny petitions for reconsideration asking us to establish alternative ways o f calculating compensation for the Interim and Intermediate Periods.

13. Third. having established a mechanism for allocating fair per-phone compensation, we dispose of issues raised in petitions for reconsideration that complicate the payment o f such compensation for the Interim and Intermediate Periods. We affirm that, in the ***First Report and Order,*** the Commission terminated its earlier proceedings related to whether compensation should be paid under TOCSIA.[22] Accordingly, as a matter o f law, there is no lingering obligation on this Commission to allocate some additional amount of compensation for 1992 to 1996 (the period during which TOCSIA predated section

---

[19] The Colorado Payphonc Association Petition for Partial Reconsideration(*CPA* Petition) at 19-25 (Apr. 21, 1999); American Public Communications Council (APCC) Comments at 2-13 (Oct. 20, 2000); Letter from Robert F. Aldrich. Counsel for APCC, to Marlene H. Dortch, Secretary, FCC at 2-3 (May 23, 2002).

[20] ***Fourrh Reconsideration Order,*** 17 FCC Rcd at 2022-26, ¶¶ 5-14.

[21] *Id.* at *2035* ¶ 39.

[22] ***First Reporr and Order,*** 11 FCC Rcd at 20546, ¶ 9.

276). We also affirm our decision in the ***Third Reporr and Order*** that PSPs must refund the difference between payments they received during the Intermediate Period at the 28.4 cent cornpensation rate and payments recalculated at the 23.8 cent rate.

14. Fourth, we dispose of several issues raised in petitions for reconsideration related to mechanisms for rendering compensation and refunds owed. We reaffirm our decision, made first in the ***Third Reporr and Order*** and affirmed in the ***Fourth Reconsideration Order,*** that payments, refunds and any adjustments shall only be made between carriers and PSPs, and we decline to adopt an alternative method proposed by APCC that would require carriers to balance payments against each other. We affirm our decision in the *ThirdReporr and Order* that refunds for overpayments are payable by PSPs first through an offset against amounts owed for the Interim and Intermediate Periods. We also clarify the process by which such offsets may be made and also the process which may be used, in the absence of any such offset or if such offset proves insufficient, to allow carriers to offset against future payments to PSPs. We also deny petitions for reconsideration ofour decision in the ***Fourrh Reconsideration Order*** to apply the IRS-prescribed interest rate for payments of compensation and refunds for the Interim and Intermediate Periods. Finally. in response to WorldCom's petition for clarification of certain issues rclated to compensation for inmate calls, we note that the ***Fourth Reconsideration Order*** was sufficiently clcar and limited so as to address WorldCom's apparent concern.

15. Fifth. having disposed of all issues necessary to resolve payment *of* per-phone compensation for the Interim and Intermediate Periods," we dispose *of* three remaining issues. **As** required by the D.C. Circuit's remand of the ***Firsr Reporr und Order,*** we allow LECs to use net book value when valuing payphone asset, transfcrred by LECs to a separate affiliate or operating division. We also deny the petition for reconsideration by CPA asking us to require carriers to implement targeted call blocking. Finally, we establish that this Order will be cffective 30 days after it is published in the Federal Register.

A. Rate Reconsiderations

1. Reconsideration of Number of Calls

16. In the ***Fourrh Reconsiderarion Order,*** based on additional data submitted to us by commenters, the Commission altered the calculation of per-phone compensation for the Interim Period by increasing the estimated number of compensable calls (access code and subscriber toll-free calls) placed from the average payphone from 131 to 148.[24] In their reconsideration petitions, Sprint and WorldCom argue that per-phone compensation should be based on the 131 monthly compensable calls estimated by the Commission in 1996.[25] WorldCom further argues that, for periods beyond the Interim Period, we

[23] **We** note that APCC, Sprint Corporation, MCI and Frontier Corporation filed peritions for reconsideration and review of a Bureau-level decision and a Division-level decision, each related to per-phone compensation for the Intermediate Period. ***See Implementation of the Pay Telephone Reclassification und Cornpensarion Provisions of the Telecommunications Act of 1996,*** CC Docket No. 96-128, Memorandum Opinion & Order, 13 FCC Rcd 10893 (Com. Car. Bur. 1998); Order, 13 FCC Rcd 7303 (Enf. Div. 1998). These petitions attack various aspects ofthe waiver process by which per-phone compensation was paid during the Intermediate Period, variously arguing that the formula used to calculate call volumes systematically undercompensated independent PSPs and also that the Bureau could not, consistent with ***Illinois,*** limit such compensation to only a few IXCs. To the extent that the ***Fourrh Reconsideration Order*** and this Order now establish the appropriate methodology for calculating and apportioning per-phone compensation for the Interim and Intermediate Periods, and allocate the responsibility for per-phone compensation to as large a group ofcarriers as possible, given available data, the questions raised in these petitions are mooted and we dismiss them accordingly.

[24] ***Fourth Reconsideration Order,*** 17 FCC Rcd at 2024-25, ¶¶ 11-13.

[25] WorldCom Inc. Petition for Reconsideration at 2-3; Sprint Corporation Petition for Reconsideration at 9-11 (April 3. 2002). If the Commission used the lower estimate of 131 calls, together with the 23.8 cent rare adopted in this Order, the per-phone per-month compensation rate would be reduced from the $35.224 (23.8 cents X 148 calls per-month) adopted in this Order to $ 1.178 (23.8 cents X 131 calls per-month).

should reduce the monthly estimate by a set factor.[26] We disagree with these arguments and deny the petitions accordingly.

17. As an initial matter, we agree with the RBOC Coalition that retaining the 131 call estimate was evaluated and rejected by the Commission in the *Fourrh Reconsideralion Order.*" The primary reason we did so was because the Commission had available to it more reliable data than was originally available to the Commission when it first adopted the 131 call estimate in 1996. The 131 call estimate used in the *First Reporr and Order* was based on data compiled over a very short time frame (one to three months) during a period prior to the Interim Period.[28] By contrast, the estimates relied upon in the *Fourrh Reconsiderarion Order* were based on data from time periods of up to one year and reflects actual usage during the Interim Period, the key time frame at issue here. None of the commenters provides us any persuasive reason why, assuming we otherwise use the same methodology as we used in the *Firsr Report and Order,* it is unreasonable for us to use more reliable data in order to better ensure that PSPs receive fair per-phone compensation.

18. Sprint argues that we should revisit the *First Reporr and Order's* methodology for determining the estimated monthly call volume, as it believes taking a straight average of the data is incorrect and the data needs to be weighted." The Commission is not, however, obligated to now revisit this methodology. While the D.C. Circuit did reverse the *First Reporr and Order's* methodology for allocating per-phone compensation among carriers, and also rejected the Commission's limit of the obligation to carriers with more than $100 million in toll revenues,[30] it did not disturb the Commission's methodology tor determining the monthly estimate ofcalls. The *Fourrh Reporr and Order* does nothing more than apply this same methodology again with benefit of a larger, more reliable dataset. Given that we have now considered and applied this methodology twice, petitioners' arguments ask us to revisit, a third time, this same methodology, and we decline to do so.

19. Even if we were obligated to entertain Sprint's arguments, we would affirm that the methodology is reasonable. Although Sprint makes various arguments that the underlying call volumes were unreliable, we agree with APCC and the RBOC Coalition that the call volume data used was "fairly representative of the average payphone" and "the most accurate available indication of average monthly dial-around call volumes at independent payphones."[31] As we noted above, the data used was certainly more reliable than the data used in the *Firsr Report and Order.* Moreover, we would emphasize the fact that this was the most accurate *available* data: while Sprint has been highly critical of estimates supplied by others in this proceeding, it never availed itself of the substantial experience it has providing payphone service through its LEC operations at various locations throughout the country and failed to submit any payphone call estimates of its own in this proceeding. Nor has any other party attempted to provide data that even purports to represent an accurate estimate of monthly call volumes from a broadly representative sample of payphones.

20. Furthermore, we disagree with Sprint that our use of a straight as opposed to weighted average is somehow fatally flawed. The data submitted by commenters represents both independent and RBOC payphones, with the RBOCs submitting data from a substantially larger number of payphones. As

---

[26] WorldCom Petition for Reconsideration at 3.

[27] RBOC Payphone Coalition Comments on Petition for Reconsideration *(RBOC Coalition* Comments) at 13 (May I. 2002).

[28] As reponed in the *First Reporf and Order,* estimates of 129. 130, 124. 140 and 132 were added, and then divided by 5, to derive a simple average of 131. *First Report and Order,* 11 FCC Rcd at 20603-04.

"See WorldCom Inc. Petition for Reconsideration at 2, Sprinr Corporation Petition for Reconsideration at 3

[30] *Illinois,* 117 F.3d at 564-65.

[31] See RBOC Coalition Comments at 13; Letter from Robert F. Aldrich, Counsel for APCC, to Magalie Roman Salas, Secretary. FCC. at I (Mar. 26 1998).

we explain in further detail below,[32] however, during the periods in question RBOC payphones were predominantly "dumb" payphones deployed in lower volume areas, while independent PSPs were predominantly "smart" payphones deployed in higher volume areas. Thus, to the extent a weighted average would give substantially more weight to the RBOC estimates, it would underestimate the volumes for independent PSPs.[33] Accordingly, it is reasonable for us to continue to use a straight average in order to give equal weight and credence to all of the data submitted. This is particularly the case where. as wc noted in the ***Fourth Reconsideralion Order.*** the data fell within a relatively small range.

21. We note that Sprint's argument that we now use a weighted average conflicts with its request we use the 131 call estimate. As we explained above, this estimate was also based on a straight average, but Sprint fails to explain why we should reject a more reliable dataset in favor of a less reliable dataset, but use the same methodology anyway. This contradiction in Sprint's arguments only highlights the fact that while Sprint has explored every argument possible to undermine the Commission's chosen approach for estimating monthly call volumes. it has failed to provide any more reasonable way of estimating monthly call volumes or otherwise providing for per-phone per-month compensation.

22. We also disagree with WorldCom that we must adopt a factor that would account for a decline in calls for periods beyond the Intermediate Period. We agree with the RBOC Coalition that WorldCom has not provided evidence of any such decline that would allow us to determine some reasonable factor, and the record in this proceeding does show that, at least for the Intermediate Period, per-phone call volumes may have actually increased[34] Moreover, for both the Intermediate Period and after the Intermediate Period, while it is entirely possible that monthly call volumes per payphone have declined, WorldCom has not provided us with sufficient argument or data to create anything approaching a reasonable factor: in its petition, it simply asks for some "annual percent decline factor," and provides an example of 10%, then subsequently alleges in its comments that the decline is on the order of 2.7% a year.[35] We could not reasonably adopt some sort of decline factor on this record and will not do so at this time

2. 1+ Calls

23. In its petition for reconsideration of the ***Fourth Reconsiderorion Order,*** the RBOC

[32] *See infra* Section III.B.1.a.

[33] We also note separately that additional data provided recently by the RBOCs further supports our use of an estimate of 148 calls. Data provided by the RBOCs for 1997 in response to the Commission's request, *see infra* Section III.B.1.a, shows that RBOC payphones could have averaged over 188 calls per-month, if we assume (as did the RBOCs for the purposes of the submission) that completed calls equaled calls with hold times of 40 seconds or more. This amount of 188 calls per-month is derived by taking the total of all calls reported for the fourth quarter of 1997 by the RBOCs, 782 million, and dividing by the number of RBOC payphones in service at the end of 1997, 1.4 million. ***See*** RBOC Coalition Comments, Andersen Report at 10 (filed July 13, 1998). (These numbers exclude call data submitted for GTE, as this data was based on call attempts regardless of call length.) From this calculation, each RBOC payphone would have had 565 calls over the fourth quarter of 1997, or 188 calls per-month. Obviously, this estimate, if uscd in our methodology or the weighted average advocated by Sprint, would increase the estimated number of calls per-month. We do not rely on this calculation here. as we have not endorsed the use of the 40 second hold time as a proxy for completed calls, the data is over a shorter period of time than the estimates used in out methodology, and we otherwise decline to reconsider our reasonable methodology for determining a monthly per-call estimate. We do, however, draw additional comfort from this analysis that our use of the 148 call volume estimate is reasonable and should not be disturbed in favor of the questionable estimate of 142.6 calls proposed by Sprint.

[34] RBOC Coalition Reply at 14-15.

[35] WorldCom, Inc. Petition for Reconsideration at 2; WorldCom, Inc. Comments on Petition for Clarification and Reconsideration at 1-2 (May 15, 2002).

Coalition **asks** that the Commission require carriers to compensate PSPs for 1+calls made during the Interim Period for which the PSPs were "not otherwise compensated."[36] The RBOC Coalition states that its desired result follows from the Enforcement Bureau's decision in *Illinois Bell v. One Cull Communications*, and apparently asks us to add some amount of additional compensation to the per-phone compensation we require in this Order. We decline to grant this broad request in this Order. The *Fourth Reconsideration Order* did not address this matter, and as such it is not properly before us on petition for reconsideration of that order. Aside from these procedural defects, however, the RBOC Coalition's request. which is made in three brief sentences in an 8-page petition, simply does not provide us with enough detail or data to justify the imposition of a potentially significant additional compensation requirement at this time: it provides us with neither an estimate of the number of calls at issue nor any explanation as to when a PSP can appropriately consider a call "otherwise compensated." Accordingly, it would be both inappropriate and imprudent to grant the RBOC Coalition's request for a general increase in the amount of compensation to be paid.

24. We do. however, believe it is necessary to further explain the operation of *Illinois* ***Bell.*** In *Illinois Bell*. the Enforcement Bureau held that 1+ calls are not exempt from the Commission's per-call compensation requirements if PSPs do not otherwise receive compensation for these calls." While the carrier owing compensation in the case argued that 1+ calls were not typically compensated through per-call dial around compensation, the Enforcement Bureau reasoned that payphone revenue can derive from a variety of sources, including coins "deposited into the payphone, through commission payments on operator service calls, or from compensation mandated by the FCC or the states."" The Enforcement Bureau noted that this Commission's orders limit statutorily-mandated, per-call compensation to completed calls that do not produce revenue from other sources, such as access code calls and toll-free number calls, but this limitation did not mean that PSPs were not entitled to per-call compensation for other types of non-revenue-generating calls. Thus, with respect to 1+ calls, the Enforcement Bureau concluded that, because the complainants had not, in fact, received coin revenue for the 1+ calls carried on the carrier's network, the PSPs were owed compensation for the otherwise uncompensated 1+ calls, given that the Commission's orders did not purport to supercede the explicit requirements of section 276.[39]

25. While we deny the RBOC Coalition's petition on this issue, we nevertheless affirm that the Enforcement Bureau's reading ***of*** *Illinois* ***Bell*** is an appropriate reading of the requirements of section 276. Accordingly, if a PSP demonstrates specific numbers of uncompensated 1+calls, application of section 276 may well result in additional compensation. Thus. although we do not grant the RBOC Coalition's general request to increase the call estimates, we do not preclude PSPs from seeking compensation for uncompensated 1+ calls on a case-by-case basis, consistent with the principles expressed in *Illinois Bell* and our other orders implementing section 276.

3. Reconsideration of the 24 Cent Rate

26. We deny **CPA's** petition for reconsideration of the 24 cent per-call compensation rate established by the *ThirdReporr and Order*. CPA requests reconsideration of the 23.8 cent rates because it contends that the Commission: (1) inappropriately used a "stripped down" coinless phone model for the purpose of calculating payphone capital costs; (2) inappropriately used 11.25% as the appropriate interest

---

36 RBOC Coalition Comments ar 7. "[A] 1+ call is an interLATA toll call originating at a payphone and carried by an [IXC], where the IXC's operator or its automated rating system directs that calling party to deposit coins for the call." *Illinois Bell v. One Call Communications,* 16 FCC Rcd 16697 (Enf. Bur. 2001) *(Illinois Bell)*.

37 *Illinois Bell,* 16 FCC Rcd at 16701, § 9.

38 *Id.* (quoting *Implementation of the Pay Telephone Reclassification ond Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Notice of Proposed Rulemaking, 11 FCC Rcd 6716, 6725, ¶ 15 (1996) (*Payphone NPRM*)).

39 *Id.*

rate; and (3) did not correctly calculate maintenance costs." We deny CPA's petition with respect to each of these factors.

27. As an initial matter, we note that the conclusions relevant to the first two factors were first raised, discussed. and decided in the *Second Reporr and Order* -- we decided that each of these costs could be appropriately considered when reducing the coin rate to obtain a reasonable coinless rate.[41] They were thus not only first decided in 1997, they were subject to petitions for reconsideration and comments filed after remand of that Order. CPA essentially argues that application of these factors in the "bottom up" calculation we established in the *Third Reporr and Order* gave CPA its first opportunity to ask for reconsideration of these factors." CPA has not, however, provided us any reason to reverse either of our decisions on these (actors, after considering their substance for the third time. CPA's arguments liave already been considered and rejected or they rely entirely on evidence available to it before the release of the *Third Report and Order.* With regard to the payphone model used for calculating capital costs, CPA only stated that it "disagreed" with our conclusion and reiterated arguments made by the RBOC Coalition that were rejected in the *Third Report ond Order."*

28. With regard to using 11.25% as the appropriate interest rate for calculating an appropriate per-call factor. CPA argues that this rate of return drastically understates the cost of capital for a typical PSP, and that the appropriate cost ofcapital might he as high as 18%.[44] CPA argued in its reply that "[b]ecause the cost of capital was used to make a subtractive adjustment lo the local coin rate [of $0.35 in the Second Report and Order], the use ofthe cost of capital actually worked in the PSPs' favor. PSPs cannot be faulted for failing to seek review of a determination that did not 'aggrieve' them." Accordingly, "it is only with the adopting of [the cost-of-service] methodology in the Third [Report and Order] that CPA and other PSPs have become 'aggrieved' by the Commission's use of an inadequate rate of return."" CPA may be correct that it was not "aggrieved" when we applied the 11.25% rate in the *Second Report and Order,* but it fails to provide us any facts that could not also have been submitted while we were considering the *Third Report and Order.* Indeed, APCC made these very arguments while the Commission was considering the *Second Report and Order.* and after remand of that order again raised them as the Commission was considering the *Third Report and Order.*[46] CPA's arguments thus constitute nothing more than a third attempt to prevail on this argument, and provide us no persuasive reason why we should disturb our earlier reasoning that, for the purpose of calculating an appropriate interest component for the per-call rate, the Commission should use a rate that corresponds to weighted average of debt and equity costs for the vast majority of payphones.[47]

29. With regard to maintenance costs, the *Third Report and Order* took a weighted average cost for RBOC and non-RBOC payphone maintenance costs. and reduced this average by 38% to account for maintenance visits due to coin collection.[48] CPA argues that the exclusion should have been 29%

---

[40] CPA Petition at 3

[41] *See Second Report and Order,* 13 FCC Rcd at 1790, ¶ 26.

[42] *See, e.g.,* CPA Petition at 4-5

[43] Even the RBOC Coalition and GTE, who support CPA's petition, note that **CPA** has made arguments that are substantially the same as arguments already made by the RBOC Coalition. RBOC Coalition Comments at *5; see also* Cable & Wireless Reply at 3.

[44] CPA Petition at 13-15

[45] *Id.* at 5-6

[46] *See Second Reporr and Order,* 13 FCC Rcd at 1806, ¶ 60: APCC Reply Comments (Sept. 10, 1997) at 15 ("rates of 15%-18% are more realistic"); *see also* Sprint Corporation Opposition to Petition for Reconsideration at 3-4.

[47] *Second Report and Order,* 13 FCC Rcd at 1806, ¶ 60.

[48] *Third Report and Order,* 14 FCC Rcd at 2625-26, ¶¶ 175-77.

because the data we relied on shows that 9% ofthe costs were due to combined coin collection and maintenance visits."[49] CPA's argument rests on the assumption that every combined coin collection and maintenance visit should be included in per-call compensation because every "visit would have been made regardless of whether coins were also collected."[50] Thus, CPA demands that the entire 9% of combined visits be excluded as a whole. We are not persuaded that we should exclude this entire amount. The 38% exclusion was referenced in the *Secund Report and Order,*[51] and the proper calculation of maintenance costs was again subject to comment and reply after remand of that Order. CPA first raised objections to this exclusion only on reconsideration ofthe *Third Reporr and Order,* and based these objections on an analysis of the data that plainly could have been applied during the pendency of that order. It would thus be inappropriate for us to reconsider our decision based on CPA's late analysis. Even if it were appropriate for us to consider **CPA's** analysis, CPA has not shown that our conclusion was clearly erroneous or an unreasonable way of estimating maintenance costs, or provided us any more reasonable way of doing so. As AT&T and Sprint point out, many of those visits where maintenance was performed, along with coin collections, could have started out as coin collection only visits, and the collector, spotting some minor trouble, performed incidental repairs.[52] We thus decline to reexamine the maintenance factor.

4. Reconsideration **of** Interest Component

30. When the Commission established a per-call compensation rate of 24 cents in the ***Third Reporr and Order***, it calculated the marginal costs ofproviding payphone service, and included a cost component of 0.9 cents to quantify the time value of money lost during the typical four-month delay in payment to PSPs.[53] When the Cornmission established a per-phone per-month compensation rate in the ***Fourth Reconsideration Order,*** the Commission calculated the per-month rate by first deducting this cost component of 0.9 cents trom the 24 cent rate.[54] In its petition for reconsideration of the ***Fourth Reconsideration Order,*** APCC argues that, for purposes of calculating per-phone compensation, we should not have removed the 0.9 cent payment delay cost component from the per-call compensation rate calculated by the ***ThirdReporr and Order.*** APCC argues that we should have left the 0.9 cent component in the rate bccausc the ***Third Report and*** Order did not specify that this component would be removed. APCC also argues that during the Interim Period and other periods payment was made on a quarterly basis. and removal ofthe 0.9 cents undercompensates and otherwise results in inequity to PSPs. AT&T and WorldCom oppose APCC's petition tor reconsideration because they allege applying the IRS-prescribed interest rate to late payments, as we required in the ***Fourth Reconsideration Order,*** adequately compensates **PSPs** for any payment delays, including the four-month delay due to the traditional quarterly billing cycle of payphone compensation.

[49] CPA Petition at 15-16.

[50] *Id.* at 7

[51] ***Second Report and Order,*** 13 FCC Rcd at 1815, ¶ 83

[52] AT&T Opposition to Petition for Reconsideration (July 7, 1999) at 4; Sprint Opposition to Petition for Reconsideration (July 7, 1999) at 5. Moreover, AT&T and Sprint also argue that even though we reduced maintenance costs to remove coin collection, they should have been reduced even further as coin payphones are generally more expensive to maintain than coinless payphones. AT&T Opposition at 5; Sprint Opposition at 5-6

[53] For example, a carrier is usually billed in April for payphone calls originating during January, February and March (the first quarter ofthe year), and the carrier issues a check to the PSP by July 1 (the first day of the third quaner).

[54] This deduction impacts the resulting per-phone per-month compensation rate as follows. If the interest rate component is deducted, the resulting per-phone per-month compensation rate is $33.892, as we held in the ***Fourrh Reconsideration Order*** (22.9 cents X 148 calls per-month). If the interest rate component is not deducted, the resulting per-phone per-munth compensation rate is $35.224, as we calculate below (23.8 cents X 148 calls per-month).

31. Upon reconsideration of this issue, we agree with APCC and restore the 0.9 cent component to compensation paid for the Interim and Intermediate Periods. As an initial matter. the text of the *Third Report und Order* supports APCC's interpretation that we intended to address interest because "PSPs [had] not received full compensation for [the Interim] period,"[55] and thus that we intended only to resolve the rate applied to late payments but not reduce the per-call compensation rate for purposes of calculating Interim Period compensation. Furthermore, while the *Fourth Reconsideration Order* sought to, and did, clarify the interest rate that would be applied to late payments, it was unclear as to the date on which the IRS-prescribed interest rate would begin to accrue. Accordingly, confusion as to when to begin applying this ratc led to the disputes in this proceeding – PSPs argued that they are ultimately undercompensated, while carriers argued that PSPs are placed in a favored position. The only way to avoid these types ofdisputes is to set forth clear rules as to when the IRS-prescribed interest rate will begin to accrue. and adjust the interest component of the per-call, and thus per-phone, compensation rate accordingly.

32. As we explain in further detail below in affirming our decision to use the IRS-prescribed interest ratc for late payments.[56] the IRS-prescribed interest rate will accrue when payment would have been paid according to the quarterly system established by industry consensus and endorsed by this Commission in the *First Report and Order.*[57] Accordingly, it is necessary to reinstate the 0.9 cent interest rate component to ensure that the per-call rate, for the purpose of calculating per-phone compensation during the Interim and Intermediate Periods, continues to reflect an assumed average delay in the rendering of payphone compensation, We thus grant APCC's petition for reconsideration on this issue.[58]

5. Revised Compensation Calculation

33. As we described above, In the *Fourth Reconsideration* ***Order,*** we determined that the per-phone per-month compensation rate would be $33.892, calculated by taking the per-call compensation rate of 24 cents set in the *Third Report and Order,* deducting cost components of 0.2 cents for FlexANI and 0.9 cents for interest payable on account of regularly delayed payments, and then multiplying the resulting 22.9 cent rate by a revised estimate of 148 compensable calls per-phone per-month. In this Order, however, we have reinstated the 0.9 cent interest rate component in response to APCC's petition for reconsideration, and otherwise denied petitions for reconsideration that would have impacted the per-call rate or the estimated number of calls per-month. Accordingly, we now calculate a per-phone compensation rate based on an assumed per-call rate of 23.8 cents, which represents the 24 cent rate calculated in the *Third Report and Order* reduced by $0.002 for the FlexANI amount that was not payable during the Interim and Intermediate Periods.[59] The per-call rate of 23.8 cents multiplied by the 148 calls per-month affirmed above equals a per-phone per-month compensation rate for the Interim and Intermediate Periods of $35.224. The compensation obligations as shown at Appendices A, B and C are calculated using this increased amount.

---

[55] *Third Report and Order*, 14 FCC Rcd at 2636 n. 427

[56] See *infra* at III.D.2.

[57] *First Report and Order, 11 FCC* Rcd at 20598-99

[58] Granting APCC's Petition for Reconsideration on this issue effectively moots Sprint's petition that we clarify that the 22.9 cent rare applied to all true-ups for the Intermediate Period, whether a carrier paid on a per-phone or per-call basis. *See* Sprint Corporation Petition for Reconsideration at 16. It also moots WorldCom Inc.'s Petition that we clarify that the rate of 22.9 cents per compensable call applies to payments for payphones that do not transmit payphone-specific coding digits, even if the carrier has compensated on a per-call, rather than per-payphone basis for those payphones. *See* WorldCom Inc. Petition for Reconsideration at 5-6. **As** set forth in this Order, the same 23.8 cent rate that applied to per-call compensation during the Intermediate Period applies to determine per-phone compensation, and a i set forth *supra* Section *III.D.2.* interest will accrue from the point at which payments normally would have been considered late.

[59] ***See*** *Third Reporr and Order,* 14 FCC Rcd at 2023, ¶¶ 7-8

B. Allocation of Per-Phone compensation Rate

1. Allocation Methodology

a. Background and Discussion of Alternative Methodologies

34. The *First Report and Order* established that, during the Interim Period, compensation would not he paid on a per-call basis, hut would instead he paid on a per-phone basis.[60] The Commission made IXCs collectively liable for the then applicable per-phone per-month payment,[61] which required some method of allocating the payment burden among the various companies. The Commission also used annual toll revenue as a basis for allocation of payment responsibility between the carriers. Each carrier with toll revenue exceeding $100 million was responsible for its pro-rata share, based on the ratio of its toll revenue to that of the industry as a whole. In *Illinois*, the D.C. Circuit rejected the commission's allocation methodology. finding no logical nexus between a carrier's annual toll revenue and its share of payphone-originated calls. The court also found it arbitrary to require Interim Period compensation only from carriers with annual toll revenue over $100 million.[62] We must now implement a new allocation methodology for per-phone compensation,

35. In addition to the initial *Notice of Proposed Rulemaking*,[63] two public notices in this proceeding solicited comments on an appropriate methodology.[64] We received numerous proposals, both in response to these notices and also as part of various parties' petitions for reconsiderations of the *Fourfh Reconsideration Order.* Below, we describe somc of these proposed methodologies.

36. AT&T proposes to allocate responsibility for per-phone compensation by using each carrier's proportionate share of the 1997 toll-free services market. Other carriers demonstrate that this approach is infeasible. Sprint, for example, argues that this approach suffers from the veryflaw identified in the original methodology by the D.C. Circuit in *Illinois*: there is no necessary nexus between the toll-free market and the payphone market. AT&T's proposal also suffers from data availability problems. AT&T claims that data on each carrier's toll-free traffic is available from the industry SMS/800 database, but Sprint argues that carriers do not usually report separately toll-free service revenues. Sprint explains that there is no publicly reported carrier revenue data that can serve as a surrogate for the number of toll-free calls handled by each carrier. Moreover, WorldCom asserts that carriers do not report toll-free revenues to the Commission and do not release such revenue information publicly.[65] Significantly, WorldCom states that it lacks the ability to determine billed revenues for its 1997 toll-free service.[66]

37. WorldCom proposes that the Commission allocate responsibility for per-phone compensation by subtracting private line revenues reported on the Universal Service Worksheet from reported toll service revenues.[67] We agree with Sprint, however, that not all carriers participate equally in the market for commercial toll-free calls or the market for dial-around operator service calls.[68] Sprint

[60] *First Report and Order.* 11 FCC Rcd at 20601-04, ¶¶ 119-26.

[61] As noted above, the per-phone per-month compensation rate was $45.85, but under this Order has been changed to $35.224.

[62] *Illinois*, 117 F.3d at 564-65.

[63] *See Payphone NPRM,* 11 FCC Rcd 6716 (1996).

[64] *Pleading Cycle Established for Comment on Remand Issues in the Payphone Proceeding*, CC Docket No. 96-128, *Public Norice.* 13 FCC Rcd 4801 (1997) (*Remand Public Norice); RBOC/GTE Payphone Coalition Files Proposal, CC* Docket No. 96-128, *Public Norice,* 15 FCC Rcd 18122 (2000) (*2000 Public Notice*).

[65] *See* Reply Comments of WorldCom, Inc. at 2 (Oct. 30, 2000).

[66] *Id.* at 3.

[67] *Id.* at 4.

[68] *See* Reply Comments of Sprint Corporation at 4 (Oct. 31, 2000)

asserts that the Commission's allocation should reflect operational characteristics of particular carriers that heavily market dial-around operator services widely-used from payphones, such as 1-800-COLLECT."“”

38. MCI Telecommunications Corporation (MCI) proposed an equal allocation for all carriers with annual toll revenues below $100 million, determined by taking their **total** percentage of toll revenues, applying this percentage to Interim Period compensation owed, and dividing responsibility for paying that amount evenly among all of the carriers." All such toll-revenue based approaches, however, lack the nexus required by the *Illinois* decision to the number of compensable dial around calls carried."

39. MIDCOM Communications suggests that the Commission receive reports from carriers and from PSPs of the total amount of toll-free and access code calls received and originated, and then undertake to itself reconcile this data and determine the amount owed to each PSP.[72] Such an undertaking would not be possible given the sheer size of such a project. We are also persuaded that not all of the requisite data are available.

40. APCC proposes in essence that the Commission not conduct an allocation at all, but that it simply deem all payments that are owed to PSPs to be roughly equal to the payments that may be owed from PSPs and terminate all liabilities simultaneously." Even assuming we had reliable record evidence to allow us to make such a finding, doing so would fail to respond to the D.C. Circuit's remand in *Illinois,* which directs us to re-examine how to allocate the responsibility to pay per-phone compensation among carriers. APCC fails to provide us any persuasive reason how we could do so without acting in an arbitrary and capricious fashion, particularly in light of the fact that we have repeatedly held, and hold again in this Order,[74] that payment obligations runs between individual carriers and individual PSPs and does not allow APCC's industry-wide solutions. Wc would also note that APCC's proposal only concerns independent PSPs, and even if we were to somehow be able to distinguish independent PSPs from ILK-owned PSPs, we would still be left with the need to allocate payment obligations for ILEC-owned payphones. Thus, APCC's proposal is, at most a partial solution, and one that we cannot reasonably adopt.

41. Sprint proposed recently to base Interim Period compensation on a self-determination by each IXC owing compensation." Under Sprint's proposal, each IXC would independently assess its own data to ascertain the number of compensable access code and subscriber toll-free calls originating at payphones that it handled during a 1998 sample period. There would thus be no "allocation" of the per-phone amount, but a series of independent estimates of compensation liability by each IXC.[76] Generally, Sprint argues that this is a better approach than the methodology adopted under the *First **Report** and*

---

[69] *Id* at 4-5

[70] MCI Comments at 6-7 (Aug 26, 1997).

[71] *See* Comments of Teleleasing Enterprises at 11 (Aug. 26, 1997) (an allocation "based on toll revenues is flawed because the total toll revenues do not appear to bear much relationship to the total number of [payphone] calls being routed to a particular carrier"); Comments of Cable & Wireless, Inc. at 16 (Aug. 26, 1997) ("Allocating compensation based on total toll revenues without any concomitant review of the specific business objectives of the carrier is simply not rational."); Comments of General Communication at 3-4 (Aug. 26, 1997) ("Total toll revenues of a carrier does not necessarily correlate to the number of dial around calls at payphones.").

"Comments of MIDCOM Communications at 10 (Aug. 26, 1997)

[73] ***See*** Letter from Robert F. Aldrich, counsel for APCC, *to* Marlene H. Donch, Secretary, FCC, CC Docket No. 96-128 (May 23,2002).

[71] ***See infra*** Section III.D.1.a.

[75] The RBOC Coalition has made a similar proposal to use actual data. ***See*** RBOC Coalition Comments at 35. We consider and dispose of this proposal for the same reasons as discussed with regard to the Sprint proposal.

[76] Letter of John E. Benedict, Sprint Corporation, to Marlene H. Dortch, Secretary, FCC, of June 25, 2002.

Order because it is based on what Sprint characterizes as "actual" data." We decline to accept Sprint's approach for a number of reasons

42. First, Sprint's proposal does not adequately account for a significant portion of the payphones deployed and would result in undercompensation for those payphones it excludes. As discussed in numerous comments and FlexANI waiver requests in this proceeding, an IXC can identify a call as originating from a payphone only if it receives coding digits from the LEC's switch that specifically identify the originating line as a payphone line. Payphones that are hardcoded at the LEC's switch. also known as "dumb payphones," are capable of passing payphone-specific coding digits to the IXC. At the beginning of the 1998 sample period, however, approximately 40% of all payphones were "smart payphones," which are not hardcoded at the switch." Thus, these payphones do not pass payphone-specific coding digits to IXCs. While the LEC could correct this by installing a specific software package known as FlexANI on its switch,"' many LECs had not done so during the sample period proposed by Sprint. Thus. during much of the sample period proposed by Sprint, the IXC's would lack any "actual" data for smart payphones and would necessarily base their determination of compensation owed entirely on data received from dumb payphones. We could correct this flaw easily if we could assume that the volumes of calls originated from smart payphones were the same as volumes originated from dumb payphones, because we could then apply the same volumes to the per-call compensation amount and provide compensation for both types of payphones. The assumption necessary to make this correction is contradicted by the record. The RBOC Coalition has explained that smart payphones were typically located in high-volume areas, while dumb payphones were typically located in low-volume areas."' Therefore, the net result of Sprint's proposal would be to undercompensate payphones making up 40% of the market.

43. Second, if, regardless of its flaws, we were to adopt Sprint's proposal, this methodology would have a disproportionate impact on independent PSPs. Independent PSPs deployed smart payphones exclusively, and few if any were connected to LEC switches where FlexANI had been deployed.[81] Thus, even if Sprint's methodology would result in some measure of "fair" compensation to the LECs that deployed dumb payphones, the same could not be said with regard to independent PSPs.

44. Third. even if we could somehow overcome the above flaws, evidence provided by Sprint itself shows that it would be virtually impossible to ensure that PSPs received any kind of compensation from resellers who carry payphone-originated calls. Sprint argues in its Petition for Reconsideration of the *Fourth Reconsideration Order* that the "actual" data Sprint has at its disposal clearly excludes any data that would allow PSPs to discover the identity of resellers that owe them per-phone compensation: "Sprint has no information with which to track resellers' calls for the past period in question. Sprint took special care to preserve records for its own payphone compensation responsibilities, but it made no effort to gather records applicable to resellers' obligations and had no reason to believe it ever had to do so."[82] If we accept that Sprint does not have this data, then we are at a loss to figure out how PSPs might otherwise learn the identities of the resellers and other IXCs to whom Sprint may have handed calls. As

---

[77] Sprint Corporation Comments at 13 (Aug. 26. 1997); Sprint Corporation Petition for Reconsideration at 3 (April 3, 2002).

[78] *See Bureau Coding Digit Waiver Order,* 13 FCC Rcd at 5007.

[79] *Bureau Coding Digit Waiver Order.* 13 FCC Rcd at 5010-11

[80] *See, e.g.,* RBOC Coalition Reply Comments at 7 (Jul. 15, 1996) ("In those [RBOC] regions that use a mix of central-office-implemented (*i.e.*, dumb) payphones and smart phones, the dumb phones tend to be placed in lower usage areas and therefore have much lower levels of toll free calls. Smart payphones are placed in high usage areas and have higher levels of 800 calls. The former are not a proper surrogate for the latter and would understate the number of 800 calls upon which per-call compensation must be paid.").

[81] *See Second Report and Order,* 13 FCC Rcd at 1501-2, ¶ 53

[82] Sprint Corporation Petition for Reconsideration at 14 (April 3, 2002).

discussed below. we grant Sprint's Petition for Reconsideration of the ***Fourth Reconsideration Order*** reyarding the obligation of resellers lo pay per-phone compensation. Nevertheless, we do not believe it would be fair to adopt a methodology that would virtually assure that it would be impossible for PSPs to obtain the identities of, and thus per-phone compensation from, anyone but a relatively small number of facilities-based providers.

45. Fourth, some IXCs have advised us on the record that they failed to retain the payphone call data Sprint's proposal would require, even for their own operations?' Thus, allowing per-phone compensation to be based on the data that any particular IXC chose to collect and retain would, most likely, again result in undercompensation of independent PSPs even if we could somehow correct for the disparities and gaps we have identified above.

46. Finally, there is no guarantee that the independent estimates of the various carriers will amount to the $35.224 we have found that each PSP is entitled to per-phone, particularly in light of the problems with data retention and obtaining data regarding resellers noted above. Given the economic incentives, carriers estimating their own liability may well underestimate the number of calls they handled. The more payphone call data collected and retained by any carrier would increase its liability and would place it a disadvantage in relation to other carriers that failed to collect or retain this information. In this respect, it is important to note that Sprint's proposal does not provide any guidance as to how individual carriers would determine whether a call was "completed" and thus compensable. Thus; even if a carrier did have sufficient data to enable it to calculate compensation owed, Sprint's "honor system" approach would allow carriers to understate calls completed, at worst exacerbating underrccovery by the PSPs and at best simply opening the way to further disputes over compensation for past periods. For all of these reasons. we are not inclined to adopt Sprint's approach, given that it does not provide a reasonable way of ensuring fair compensation to PSPs, which is our statutory obligation under section 276.

47. Teleleasing Enterprises argues that a "fairer method ofallocation would be to allocate the flat-rate Interim Period compensation based on the relative percentage of [payphone] calls."[84] Cable & Wireless similarly argues that the Commission "must adopt a compensation plan that is apportioned on some factor which related to the number of payphone-originated calls received by the carrier,"" While neither company provides a substantive recommendation about how to achieve such a result, this approach would directly address the D.C. Circuit's remand by establishing a clear nexus between the allocation and carrier responsibility, and would not suffer from the flaws of Sprint's approach.

b. Discussion

48. As the divergent proposals from interested parties make clear, there is no single answer to the allocation question. The best method would be to gather the actual data that would identify the total number of all compensable payphone calls handled by each carrier, but such data are not available, and given the technological limitations noted above likely never existed in the first place. The "perfect" allocation is thus impossible. We are thus forced to make a determination based on an *approximation* of the true data. We believe that actual data showing the routing of payphone calls from LEC switches to IXCs in time periods proximate to and consistent with the Interim Period and the Intermediate Period will allow us to construct an allocation that reasonably approximates the "true" allocation and will **thus** enable us to make a reasonable estimate of each carrier's liability for payment. We have conducted such an analysis and have set forth the results, showing each carrier's pro rata share of the per-phone payment, in a Table of Allocation located in Appendices A, B and C. In the succeeding paragraphs, we explain how wc obtained and analyzed the data to generate the final result.

---

[83] ITC^DeltaCom Petition for Reconsideration at 8-9; WorldCom Inc. Reply Comments at 4 (Oct. 30, 2000)

[84] Comments of Telaleasing Enterprise. Inc. at 11

[85] Comments of Cable & Wireless, Inc. at ii (Aug. 26, 1997).

49. Commission Data Request. By letters dated December 20, 200 I, the Common Carrier Bureau[86] requested that the four RBOCs submit quarterly data on the routing of payphone calls to IXCs or othcr carriers during 1997. 1998 and October 1, 2000 through September 30, 2001. These periods were selected because payphone compensation is typically paid, and calling data collected, on a quarterly basis, and these data periods closely corresponded with the Interim Period. the Intermediate Period, and the most recent data available for the period after the Intermediate Period. Specifically, the Interim Period began on November 7, 1996, and ended on October 6, 1997. Thus, data from 1997 would provide calling patterns from the first full quarter of the Interim Period through the last quarter of 1997, thus allowing us to take into account an entire year and control for any seasonal variations. The Intermediate Period began on October 7. 1997, included the entire calendar year of 1998, and ended on April 20, 1999. Thus. data from 1998 would provide an adequate sample period for the Intermediate Period because it would cover the majority of the Intermediate Period. and again the twelve-month period would be sufficient to reflect seasonal variations. For the post-Intermediate Period. it would have been necessary to wait until April I. 2002 to obtain data for the entire calendar year of 2001, reconciled data on payphone calls originating in the fourth quarter of 2001 would only have been available on this date. Accordingly, the Bureau asked for the twelve month period beginning October I, 2000 and ending on September 30, 2001

50. Each of the RBOCs subsequently provided the Bureau with aggregate call data listing the next destination past the RBOC switch of payphone calls placed from their payphones during the relevant time periods. In other words, we received a list of each destination and the number of payphone calls sent to that destination. Depending on the company and the quarter, some of the destinations were listed by name (i.e., MCI) and some were listed by carrier identification code ("CIC"), a four digit number that uniquely identities the destination ofthe call.[87]

51. The RBOC call data account for a total of nearly four billion payphone calls originating at more than 85 percent of the payphones in the United Sates, as of March 3I. 1999.[88] Accordingly, we have obtained a statistically relevant sampling that should give an accurate picture of the routing of calls made from payphones. From that data set, we can aggregate the figures to determine the total number of payphone calls received by each carrier in any given quarter covered by the sampling as well as the total number of calls placed. From there, it is a simple exercise to calculate each carrier's share of the total, and thus the proportion of the per-phone compensation that each carrier should rightfully bear. The resulting apportionment is directly tied to what we believe is a reliable estimate of the percentage of payphone calls received by each carrier. We describe below the methodology used to achieve our results.

52. **As** noted above, the RBOCs submitted quarterly data listing the number of calls placed to specified destinations. We combined the data from each RBOC as to each destination company. In addition. where the data were listed by CIC, and a destination carrier had multiple CICs, we added all of the numbers together for that particular carrier. **As** discussed above, we used the 1997 RBOC payphone call data for the Interim Period aggregations, the 1998 RBOC payphone call data for the Intermediate Period aggregations and the 2000-200 I RBOC payphone call data for the Post-Intetmediate Period

[86] This Bureau is now designated the Wireline Competition Bureau

[87] The RBOCs submitted the requested data duringthe first four months of 2002. Both the data and the Bureau's letters requesting the data were made a pan of the record in this proceeding and parties were given an opponunity to comment ***on*** them. SBC and Qwest requested confidential treatment for their submissions, which was granted on March 28, 2002. *Implemenrarion **of** Pay Telephone Reclassification and Comprnsarion* Provisions *of the Telecommunications Act of 1996*, CC Docket No. 96-128, Prorecrivr *Order,* 17 FCC Rcd 5870 (Pricing Policy Div. 2002); *Implemenrarion of* Pay ***Telephone*** *Reclassification and Cornpensarion* Provisions *of the Telecommunications Act of 1996*, CC Docket No. 96-128, *Protective* Order. 17 FCC Rcd 5877 (Pricing Policy Div. 2002). Under the terms ofthe protecrive orders. othcr parties could examine the data, subject **to** restrictions.

[88] Because the RBOC data account **for** such a large percentage of payphones, we did not seek data from the 1300 non-BOC incumbent local exchange carriers. Moreover. the data set has great geographic diversity and includes both rural and urban areas.

aggregations. Once the basic aggregation was completed, however, we needed to adjust the data in various ways in order to obtain a reasonable allocation.

53. Nun-carriers. Some of the data submitted includes payphone calls routed to destinations that were not IXCs or other carriers. For example, one entity to which calls were routed was the Legal Aid Society of Orange County; another was **J.C.** Penney. The data set included such data because entities with dedicated private line service may be assigned CICs even though they are not "communications carriers" and thus should not be responsible for payphone compensation. In those circumstances, it was not possible to identify the carrier that should have paid for the call, and we have removed those calls trom thc data set. We have attempted to weed out such instances, and have included in Appendix D a list of the non-carrier CIC holders.[89] The numbers involved do nor have much effect on overall liability, however. We excluded 219,688 (out of nearly a billion) payphone calls in 1997, 284,972 **(out** ofseveral billion) calls in 1998, and 67,022 (out of more than one billion) calls in 2001.

54. Carrier Classification. In the *Fourth Reconsideralion Order,* we decided that the Commission's Carrier Locator Reports ("CLRs") should be used to classify a carrier for purposes of determining its duty to pay.[90] The data make clear, however, that calls are routed to more carriers than are listed in the CLRs. Carriers do not always serve a single role in the telecommunications industry. For example, Sprint is both an ILEC and an IXC; AT&T is an IXC and a CLEC; and Verizon is an ILEC, IXC and toll reseller. We agree with CompTel that "[i]t is the act of carrying compensable calls, not the label the Commission places on a carrier, that determines whether a carrier owes compensation for payphone calls."[91] Section 276 makes no distinction among providers of telecommunications services for the purpose of providing compcnsation and neither will we. In light of the data we have received after releasing the *Fourrh Reconsideration Order,* we have accordingly reconsidered our decision to use such reports to distinguish IXCs from resellers and have instead based the allocation without regard to whether a company considers itself to be an IXC, a reseller, or some other type of provider of telecommunications services.

55. LEC Payment Responsibility. In the *Firsr Report and Order,* we decided that LECs must pay payphone compensation to the extent that they handle compensable payphone calls.[92] For LECs, this can happen in two ways.[93] The first instance is when a LEC terminates a compensable call that is both originated within its own service territory and not routed to another carrier **for** completion. The second instance is when a LEC also provides interexchange service and carries the call as would any other IXC. We make payment provisions for both types of payphone calls as follows.

56. First. the record in this proceeding indicates that incumbent LECs do, in fact, complete payphone calls that are not routed to other carriers, and the RBOC Coalition has in fact recognized that

---

[89] Because such entities had no notice that they could he responsible for payphone compensation, we will not hold them liable. We will also excuse governmental entities such as. thc Internal Revenue Service, and various state governments, that wcrc in the RBOC data. We may nor, however, have identified all of them; thus, some entities on the allocation chart may not in fact he carriers. Any entity named in our allocation that then receives a request for per payphone compensation from a PSP or other entity may, within ninety (90) days **of** receiving such a request, file a waiver request with the Wireline Competition Bureau for exclusion from our allocation, with a demonstration that the entity provides no communications service to others.

[90] *Fourth* ***Reconsideralion*** *Order,* 17 FCC Rcd at 2028,120

[91] Comments of the Competitive Telecommunications Association at 15 (Aug. *26,* 1997).

[92] *First* ***Repori*** *and Order,* 11 FCC Rcd at 20584 **n** 293: *see also Fourlh Reconsiderorion Order,* 17 FCC Rcd at 2026-2027.

[93] The Allocation Table reflects compensable calls handled by competitive LECs (CLECs) acting in an IXC capacity by identification ofthe CLEC by name and specifying the **amount of** per payphone compensation to be paid by that CLEC.

there is "no principled reason why LECs should be excluded" from the obligation to pay compensation."[94] The RBOC Coalition has placed into the record of this proceeding compensable call volumes originating from their payphones amounting to 2.19% of all compensable payphone calls.[95] The data has been on the record in this proceeding for over four years, represents 400,000 payphones from a geographically diverse group of RBOCs,[96] and there has been no indication in the record that other incumbent LECs objected to this amount or alleged substantially different call percentages. We also note that this figure was derived from CIC-code based studies that are consistent with the allocation methodology adopted in this Order." We thus conclude that it is appropriate to allocate to both RBOC and non-RBOC incumbent LECs a percentage of the calls (2.19%) originating from payphones within their own service territories. Rather than making each ILEC remit payment to each **PSP** in the nation, however, we require each incumbent LEC to a PSP only if the PSP operates in the incumbent LEC's local exchange area.[98] This percentage and the appropriate compensation rate are set forth at Appendices A, B and C.

57. Second. an examination of the RBOC data submitted in response to the Bureau's request shows that RBOCs themselves sometimes behaved as IXCs. For instance, SBC reponed that it routed to Bell Atlantic Communications over ***2.5*** million payphone call attempts in 1998 so that Bell Atlantic could act as an IXC and transfer the call to the appropriate LEC. Where Bell Atlantic and other RBOCs have routed such calls from one LEC to another LEC, their routing of those calls was very different from their routing of calls that both originated and terminated within their own service territories. Instead of providing true local exchange service. these RBOCs were providing interLATA long distance service out-of-region. Further, there is no indication that the above-referenced 2.19% estimate provided by the RROC Coalition in 1998 included any out-of-region payphone calls routed by the RBOCs. We therefore conclude that incumbent LECs owe compensation for calls where the incumbent LEC performed the function of an IXC, and that this compensation obligation should be allocated in a manner consistent with other payors of per-phone compensation, including IXCs. In other words, to the extent that the RBOC data show calls originating in an RBOC territory and were transferred to another incumbent LEC, that incumbent LEC owes per-phone compensation to all PSPs nationwide. The Allocation Table reflects compensable access code and subscriber toll-free calls routed by incumbent LECs acting in an IXC capacity, and specifies the amount of per-phone compensation to be paid by that incumbent LEC.

58. Affiliation Obligations. In Appendices A, B and C, we identified payors obligated to pay per-phone compensation by the names of payors and carrier identification codes (CICs) provided by the

[94] RBOC Coalition Comments at 34-35.

[95] Letter from Michael K. Kellogg, Counsel to RBOCIGTEISNET Payphone Coalition, to Rose M. Crellin, FCC (March 27, 1998).

[96] *Id.* at 2.

[97] ***Id.:see also*** Letter from Michael **K.** Kellogg, Counsel to RBOCIGTEISNET Payphone Coalition, to Rose M. Crellin, FCC (March 24, 1998) at 1-2.

[98] Each incumbent LEC must make the 2.19% payment to PSPs for each payphone located in its service territory, even if the PSP had/has its payphones connected to a CLEC. Even if a loop or resold service is provided by a CLEC to a PSP, this is irrelevant lo a determination of responsibility for per-phone compensation: for the purposes of dial around compensation, it does not matter who provides the local loop: rather, only those carriers that receive calls compensable under our rules are required to provide compensation. The 2.19% applies to incumbent LECs because it accounts for, and only reflects, the fact that an incumbent LEC does receive and carry compensable calls originated within its territory. For example, to the extent this 2.19% includes calls made to subscriber toll-free services provided by the incumbent LEC. the incumbent LEC would owe this compensation regardless of whether the incumbent LEC or a competitive LEC provided the loop to the PSP. We also note that, to the extent many CLECs will be required to pay some portion of per-phone compensation as a result of carrying interexchange and other traffic, as detailed at Appendices **A** and B, CLECs are not escaping from their obligation to pay a fair allocation of dial around compensation.

RBOCs in the payphone call data submitted this spring.[99] We hasten to add, however, that given consolidation and change in the telecommunications industry over the last several years, the payor names may fail to accurately identify current per-phone obligations imposed by this Order. Any failure on our part in the name identification in Appendices **A, B** and C should not he read to excuse full payment hy any entity of its compensation obligation. The per-phone obligation ordered herein must be paid by each listed entity. or by its successors in interest, assigns. transferees or their entity legally responsible for the listed entity's obligations under this Order.[100]

59. Conclusion. **As** we have discussed, we recognize that the allocation data we have used do not result in a "perfect" allocation, but must also recognize that a perfect allocation is, and most likely has always been, impossible.[101] We find, however, that the final data set provides an adequate sampling of the most objective payphone routing information available at this time and thus enables **us** to use the data as a fair proxy for call allocation. For 1997, the usable data account for almost one billion payphone calls. for 1998, more than two and a half billion, and tor fiscal year 2001, more than one and a half billion calls. We think that, given the significant problems we identified with the various methodologies proposed by the parties and the lack of other data. our allocation **is** the best that could reasonably be derived in the circumstances.

[99] One exception is KTNT Communications. To facilitate billing and clarify payment obligations for these 39 operator service providers, we have identified KTNT Communications **as** the company obligated to pay the per-payphone compensation required by this Order. KTNT Communications tiled a notice with the Public Utility Commission of Texas on April 18, 1997 that it was the "management company responsibility" for these other operator service providers. Notice of Docketing and Suspension, Kathleen S. Hamilton, Administrative Law Judye, Public Utility Commission of Texas (Apr. 22, 1997); ***see also*** Letter of Mitchell F. Brecher, Counsel for Digital Network Services, Inc. to William A. Caton, Acting Secretary, FCC (Apr. 28, 1997) with regard to Southwestern Bell Telephone Company Tariff No. 73, Transmittal No. 2629, Petition of Digital Network Services, Inc. to Reject or Suspend. In addition, KTNT Communications and each of the 38 other operator service providers submitted "concurring carrier" documentation to qualify to use KTNT Communications tariff submissions. The **38** other operator service providers with payphone call data aggregated with data for KTNT Communications are Bay TNT Network, Who Ever. U Speak Long Distance, It Doesn't Matter, Zimmer Way, I Don't Care, **I** Don't Know, Riverbend Communications, Minh Long Distance. Viva Tel L.D., Bryant Service, Rea Long Distance, Signature Network Service, Brown Service Co., Exco Long Distance, Mustang Operators, Far Point. Knox Service Group, Sandell Operator Service, Christine LD Service, Vera Long Distance, Old Laredo Service, Old Home Operator, Andril Service Group, Any One **Is** Okay, MCV. Brdhms Communications. Forest Pine Telcom, Amadeus, Dvorak, KBTN. Callum Long Distance, Sunrise Operator, Wisteria LD Service, World Window, Hickory Grover Group, Alert Operators. and Friendly Voice Network. While KTNT Communications must pay all of the per-payphone compensation required in this order for itselfand each of the 38 entities listed in this footnote, KTNT Communications has a right of recovery from the 38 entities if such recovery does nor lead to double recovery by KTNT Communications.

[100] We note, however, that this name identification was provided for the convenience ofcarriers and PSPs alike, and was not intended to impose a modification to otherwise appropriate intracorporate relationships. **If** an entity listed on Appendices **A** or B has provided for payment of its payphone compensation allocations through separate subsidiaries or otherwise, it may, absent some other resolution agreeable *to* the PSPs to which it owes payment, ask for clarification from the Wireline Competition Bureau, which will promptly provide the appropriate attribution of allocation amounts among subsidiaries or other entities, or otherwise provide clarification **of** the per-payphone Compensation obligation required by this Order. An entity listed on Appendices **A** or **B** may not, however, avoid its obligation to pay per-phone compensation by requesting such clarification.

[101] In addition to the adjustment noted above, we note that because RBOCs were not required under any of our rules to collect and retain the specific payphone call data solicited, some ofthe data are unusable, and we have excluded unusable data from the final data set. For example, the data reflects calls routed to destinations that could not be identified. There were 822,723 such calls in 1997, 16,656,053 in 1998, and 3,798,565 in 2001. Nevertheless, those number, are quite small given the huge amount of usable data, and our conclusions remain sound.

2. Allocation to Resellers

60. Sprint requests that the Commission reverse the determination in the *Fourth Reconsideration Order* that per-phone compensation should be paid to **PSPs** by IXCs and LECs, but not by resellers (with a right of recovery from resellers).[102] We grant Sprint's petition to the following extent. As we have discussed above, the call data received from the RBOCs after the release of the *Fourth Reconsideration Order* lists carriers receiving calls by name and by CIC. Because many resellers have their own CICs, numerous resellers are included on these lists, and hence included on our allocation set forth at Appendices **A, B** and C. Accordingly, we have addressed at least part of Sprint's concern by including resellers as well as "first switch" carriers, without regard to the label borne by the carrier, and we explicitly hold that allocating compensation obligations among carriers through the use of this methodology replaces the more general statements we made in the *Fourth Reconsideration Order* about requiring first facilities-based carriers to bear the entire burden of per-phone compensation.[103]

3. Retroactive Ratemaking

61. We decline to grant ITC^Deltacom's petition to exempt from Interim Period compensation obligations those carriers with revenues below $100 million.[104] The Commission attempted to do so in 1996, and this very approach was rejected by the D.C. Circuit in *Illinois*.[105] ITC^Deltacom offers no new argument that would convincingly overcome the court's holding.

62. ITC^Deltacom argues that if the Commission expands, on remand, the Interim Period compensation obligation beyond the 24 companies listed in the *First Report and Order* such an extension would constitute impermissible retroactive rulemaking.[106] This argument fails because the regime of the *First Report and Order* did not become final due to pending judicial review, and the ***Illinois*** decision clearly put all carriers on notice of potential liability. Notice of small carriers' potential obligation to pay Interim Period compensation was likewise provided in the initial NPRM in this proceeding. Accordingly, nothing we do in this order constitutes impermissible retroactive ratemaking – it merely apportions an existing payment obligation among those entities to which we are required by the D.C. Circuit to apportion it.[107] Moreover, the result that ITC^Deltacom advocates would leave PSPs uncompensated for

---

[102] Sprint Corporation Reply Comments at 5-8.

[103] We do recognize that it is possible calls routed to facilities-based carriers' CICs may in fact have been ultimately routed to resellers. Given the inclusion of a significant number of resellers in the allocation methodology, however, the ultimate impact on the compensation paid by other carriers will most likely not be significant. Moreover, as we noted above when discussing Sprint's proposed alternative method for allocating per-phone compensation, we have no more reasonable alternative – Sprint's proposal, for example, would effectively exclude *all* resellers from compensation and thus cannot be considered "fair" compensation to **PSPs.** Moreover, if a carrier has data that calls allocated to them (i.e., routed to its CIC code) were actually carried by resellers, nothing in this Order prevents carriers from seeking reimbursement of the cost of these calls from resellers, and we explicitly hold that they may do so. We hasten to add, however, that carriers may in no way delay payment of compensation to **PSPs** on account of seeking such reimbursement.

[104] ITC^Deltacom Petition for Reconsideration at 7-8.

[105] 117 F.3d at ***565.***

[106] Although ITC^Deltacom argues on behalf of IXCs with annual toll revenue below $100 million, its legal arguments apply equally to any company not listed in the *First Report and Order.* For example, if it is impermissible retroactive rulemaking to require a small IXC to pay this compensation because the Commission failed to list small IXCs from the 1996 list, according to ITC^Deltacom's argument, it is also impermissible retroactive rulemaking to require a reseller to pay this compensation if the Commission failed to list that reseller on the 1996 list ITC^Deltacom's arguments fail in this respect for the same reason they fail as discussed above.

[107] This holding is entirely consistent with recent precedent applicable to rulings of this Commission. In *Verizon v. FCC*, 769 F.3d 1098, 1110-11 (D.C. Cir. 2001), the D.C. Circuit approved the Commission's ruling that LECs had improperly applied EUCL charges to independent PSPs, even though a Commission order allowed them to do so. The court stated that there was no retroactivity problem because "

the cleven-month Interim Period and subsequent periods. If we were to excuse any but the 25 carriers listed in the *First Reporr and Order,* yet wc could not require those 25 companies to hear more than their fair share, we would unavoidably violate the mandate of section 276 that PSPs he fairly compensated for each and every interstate or intrastate completed call originated from their phones.

63. ITC^Deltacom further argues that it failed to keep records necessary to verify the compensation for which it is responsible.[108] ITC^Deltacom's argument that it should be exempted from the allocation methodology adopted by the ***Fourrh Reconsiderurion Order*** because it cannot render traffic records is beside the point.[109] The allocation methodology adopted herein does not depend on such records. We therefore deny ITC^Deltacom's petition for reconsideration.

C. Early and Intermediate Period Issues

I. Early Period

64. Before considering whether we should reverse our order that PSPs must refund overcompensation paid to carriers during the Intermediate Period, we must address apparent confusion that has arisen regarding the Commission's consideration and disposition of payphone compensation for the period from June 1992 to November 1996 (the "Early Period"). During the Early Period, the Commission. pursuant to its authority under section 226 of the Act, required carriers to pay compensation to independent PSPs for access code calls. but coiicluded that it lacked statutory authority to require carriers to compensate independent PSPs for subscriber toll-free calls, meaning toll-free calls placed to 8XX numbers that are not access codes.[110] In ***Florida Public Telecommunications Association v. FCC,*** the D.C. Circuit found that the Commission in fact had such statutory authority and remanded to the Commission for further consideration.[111] As we describc in further detail below, CPA and APCC have argued that, in weighing the equities of ordering the Intermediate Period refund, we must take into account compensation of independent PSPs during the Early Period. This argument has raised some confusion as to how and even whether the Commission disposed of the D.C. Circuit's ***Florida*** remand.[112]

---

the agency orders on which the LECs claim to have relied not only have never beenjudicially confirmed, but wcre under unceasing challenge before progressively higher legal authorities. Our cases indicate that under such circumstances reliance is typically nor reasonable, a conclusion that significantly decreases concerns about retroactive application of the rule eventually announced. *See Clark-Cowlitz Joint Operating* ***Agency v.*** *FERC.* 826 F.2d 1074, 1083 n. 7 (D.C. Cir. 1987) (en banc) ("[A] holding of retroactivity . . . cannot be premised on a single, recent agency decision . . .that is still in the throes of litigation when it is overruled."). . . . [Moreover,] the agency pronouncements on which the LECs relied were subsequently held by this court to **be** mistaken as a matter of law. **As** such, the FCC's Liability Order was largely an exercise in error correction. We have previously held that administrative agencies have greater discretion to impose their rulings retroactively when they do so in response to judicial review, that is. when the purpose of retroactive application is to rectify legal mistakes identified by a federal court ***See*** *Exxon* Co.. ***USA v.*** *FERC.* 182 F.3d 30, 49-50 (D.C. Cir. 1999). . . . [T]he LEC's argument that the FCC may not reach the same conclusion now reduces to the assertion that the agency may not retroactively correct its own legal mistakes. even when those missteps have been highlighted by the federal judiciary. But this is nor the law."

[108] ITC^Deltacom Petition for Reconsideration at 8-9.

[109] ITC^Deltacom Petition for Reconsideration at 8-9.

[110] 47 U.S.C. §226; *Policies* ***and Rules Concerning Operator Service Access and*** *Pay* ***Telephone*** *Compensation,* CC Docket No. 91-35, ***Report and Order and Further Notice of Proposed Rulemaking, 6*** FCC Rcd 4736 (1991), ***Second*** *Report and* ***Order,*** 7 FCC Rcd 3251 (1992).

[111] ***Florida*** *Pub Telecomms. Ass'n. Inc v FCC,* 54 F.3d 857 (D.C. Cir. 1995)(*"Florida"*).

[112] Letter of Albert H. Kramer, Counsel for **APCC,** to William F. Caton, Secretary, FCC (Apr. 15, 2002); Letter of Teresa Marrero. AT&T, to Marlene Donch, Secretary, FCC (July 2, 2002).

We take this opportunity to clarify that the Commission addressed this remand fully in the *First Report und Order*.

65. In 1995, in accordance with the *Florida* remand. the Commission issued the *Second Furrher Notice* in its payphonc compensation docket, CC Docket No. 91-35, soliciting comment as to whether the Commission should require compensation for access codes calls under section 226(e)(2).[113] While the Commission was considering comments and replies received in response to the *Second Further Notice*, the 1996 Act became law. Subsequently, on June 4, 1996, the Commission adopted the ***Notice** of Proposed Rulemaking* in this docket,"' which ultimately led to the adoption of the *First Repori and Order* on September *20,* 1996.

66. In the *First Report and Order,* the Commission held that the requirement of section 276 that the Commission ensure fair compensation "for each and every completed intrastate and interstate call" superseded the compensation obligations established and previously considered in CC Docket No. 91-35.[115] Accordingly, by establishing a compensation mechanism for "each and every intrastate and interstate call," including access code calls, the Commission squarely addressed and disposed of the issue remanded for its further consideration by the *Florida* decision. This was made clear by the Commission when it stated that "[b]ecause the compensation issues raised in the *Second Further **Notice*** [in CC Docket No. 91-35] have been subsumed into this proceeding. we terminate that proceeding."[116] The Commission was clearly aware of its responsibility to address the *Florida* remand and decide compensation for access code calls, and discussed the procedural history of its implementation of section 226 when it considered compensation for the Interim Period."' Significantly, the Commission declined "to require that per-call compensation [under section 276] be paid retroactive to the date of the release of the *Norice,"* but instead required compensation during the Interim Period to commence on the "effective date of the rules adopted in this proceeding."" After this clear decision by the Commission to dispose of the *Florida* remand by establishing compensation mechanisms under section 276, no party petitioned for reconsideration or appealed the decision on the basis that section 226 or the *Florida* decision instead somehow required the Commission to award compensation retroactively to the date section 226 became effective or the date of the *Florida* decision.

67. Therefore, because the Commission disposed of the *Florida* remand in the *First Reporr and Order* and is under no obligation to reconsider or reexamine that decision. we confirm that the Commission is not now legally required to award further compensation to PSPs for calls handled during the Early Period. Moreover, as we have noted above with regard to the allocation methodology adopted in this Order, it has been hard enough to obtain data to develop a reasonable picture of compensation obligations to IXCs for 1996 to 1997. Thus, quite aside from the fact that we have settled the legal issue of compensation for the Early Period, it would not be practicable to sort out with any certainty the amount of undercompensation from the Early Period and then determine the specific amounts of money given carriers would be required to reimburse specified PSPs.

---

[113] *Policies and **Rules** Concerning Operator **Service** Access **and** Pay Telephone Compensation,* Memorandum Opinion and Order on Further Reconsideration and Second Further Notice of Proposed Rulemaking, 10 FCC Rcd 11547 (1995).

[114] *Implementation ofthe Pay **Telephone** Reclassification and Compensation provisions* of *the Telecommunications Act of 1996,* CC Docket No. 96-128, Notice of Proposed Rulemaking, 11 FCC Rcd 6716 (1996) ("*Notice*").

[115] *First Reporr ond Order,* 11 FCC Rcd at 20601, ¶ 119.

[116] *Id.* **at** 20546 n. 16 **and** 20711, ¶ 374 ("IT IS FURTHER ORDERED that the proceedings.. . in CC Docket 91-35 . .ARE TERMINATED.").

[117] *See id.* at 20601-602, ¶¶ 119-121

[118] *Id.* at 20604, ¶ 126 & n 430.

2. Refund of Payments Collected Under the 28.4 Cent Rate

a. Background and CPA Arguments

68. Although we have provided the procedural history of this docket above, in considering CPA's Petition for Reconsideration of our decision to order a refund of per-call compensation already paid by carriers during the Intermediate Period, it is useful to briefly recount how the rate for per-call compensation was established. In the *First Repori and Order,* we established 35 cents as the default per-call compensation rate. based on what we believed to be the market price for the services of a payphone. We determined that the costs of subscriber toll-free and access code calls approximated the costs of a coin call. and the inarket rate for coin calls would therefore serve as a fair proxy for the inarket rate for coinless call compensation.[119] In *Illinois*, the D.C. Circuit reversed and remanded, finding that our conclusion was contradicted by record evidence showing that the costs for the various types of calls were not similar.[120] On remand, we calculated the cost differential between coin calls and coinless ones, and subtracted that amount from the 35 cent market rate for coin calls to establish a default market rate for coinless calls of 28.4 cents. Once again. in *MCI,* the court remanded, finding that it was not rational to derive a market rate for one type of call by subtracting a cost differential from the rate for another type of call."' Importantly, however. it did not vacate the rate. On remand, we established the present 23.8 cent rate, which the court upheld in *APCC.'"*

69. Because the court did not vacate the 28.4 cent rate, PSPs were entitled to collect 28.4 cents per-call for subscriber toll-free and access code calls during the Intermediate Period, even though the court had found that rate to have been the product of arbitrary decisionmaking. In the *ThirdReporr and Order,* we decided to apply the 23.8 cent default rate retroactively to the Intermediate Period, and to require PSPs to refund the difference between the payments they received during the Intermediate Period at the 28.4 cent compensation rate and payments recalculated at the 23.8 cent rate."' CPA requests reconsideration of that decision, contending that in the *ThirdReporr and Order* the Commission did not perform the required balancing of equities prior to ordering a refund, and that the equities do not support that result.'"

70. CPA, supported by comments from APCC, raises three principal equitable points. First, it contends that in assessing the equity of refunds, the Commission must examine not only the Intermediate Period, but also the Early Period. As we discussed above, during that period, the Commission required carriers to pay compensation to independent PSPs for access code calls pursuant to scction 226(e)(2) of the Act, but did not require compensation for subscriber toll-free calls. This decision was subsequently remanded by the D.C. Circuit in *Florida,* and handled prospectively in the ***First Report** and Order*. APCC estimates that, had the Commission prescribed compensation for subscriber toll-free calls, independent PSPs would have received compensation that far exceeds the maximum amount that independent PSPs would refund to carriers for the Intermediate Period.

[119] ***Firs!*** *Report und Order,* 11 FCC Rcd at 20577, ¶ 70

[120] *Illinois*, 117 F.3d at 563-64.

[121] *MCI.* 143 F.3d at 608-09

[122] ***Americun,*** 215 F.3d at 58

[123] In a footnote in its Petition for Reconsideration. Sprint Corporation states that it did not believe the obligation set forth in the *Fnurrh Reconsideration Order* regarding per-phone compensation for the Intermediate Period, "is intended to force carriers that heretofore paid on a per-call basis to now conduct true ups on a per-payphone basis for the Intermediate Period." Sprint Petition for Reconsideration at I S n.28. Sprint is correct on this point. If carriers have already paid per-call compensation on payphones for which they received coding digits in the Interim, Intermediate or any other period, nothing in the *Fourth Reconsideration Order* or this Order requires carriers to now go back and apply per-phone compensation to these payphones.

[124] CPA Petition at 21, 25 (Apr. 21, 1999).

71. Second. CPA and APCC contend that a refund would bestow a windfall on the carriers. CPA claims that the carriers have fully recovered (indeed, overrecovered) their compensation payments during the Intermediate Period at the 28.4 cent rate by passing them through to end users.[125] APCC states that the Commission has already concluded that this is the case, pointing to the Commission's statement in the *Third* ***Reporr and Order*** that "IXCs have recovered from their customers the cost of compensating PSPs at a rate of $.284 per call."[126] In addition. CPA and APCC charge that IXCs, specifically AT&T, WorldCom and Sprint, overrecovered the cost of dial around compensation because they justified various general rate increases by reference to dial around compensation requirements and received a substantial reduction in access charge payments because of the removal of access charge subsidies for payphones."' Therefore. CPA argues. carriers will reap an unfair windfall if awarded a refund.

72. Third. APCC contends that a refund is inappropriate because independent PSPs did not in fact recover the costs of their "marginal" payphones during the Intermediate Period, even while collecting the higher 28.4 cent rate.'" According to APCC. independent PSPs failed to recover their costs because the compensation rules at that time created an unworkable payment system,"" and because LECs failed to timely implement the FlexANI system necessary for IXCs to track compensable calls originating from independent PSPs.[130] Related to this point, APCC also argues that if PSPs were required to refund a portion of per-call cornpensation paid during the Intermediate Period, WorldCom and Global Crossing would owe PSPs a significant amount of additional compensation, but PSPs would be net payors to AT&T for the Interim Period and would also be required to pay refunds to other IXCs for the Intermediate Period."' Accordingly. APCC argues, PSPs would be undercompensated because they would be forced to pay certain IXCs but could not recover amounts owed from WorldCom and Global Crossing. APCC also argues that applicable case law requires the Commission to take into account bankruptcies that have occurred since the release of the ***Third Report and Order."'***

---

[125] *See, e.g.,* Letters from Albert H. Kramer et al., Counsel for APCC, to Marlene H. Dortch, Secretary. Federal Communications Commission. CC Docker No. 96-128 (filed Sept. 23, 2002) (APCC Sept. 23 **Ex** Pane Letter) at 10-12 (discussing Sprint's end user surcharges).

[126] ***Third Report andorder.*** 14 FCC Rcd at 2637, § 199; ***see*** Lener from Alben H. Kramer et al., Counsel for APCC, to Marlene H. Donch. Secretary, Federal Communications Commission, CC Docket No. 96-128 (tiled Oct. 4.2002) (APCC Oct. 4 Overrecovery **Ex** Pane Letter). Attachment at 1-2.

[127] APCC Sept. 23 **Ex** Pane Letler at 2-7, 10-12.

[128] Letter from Albert H. Kramer, et. Al., Counsel for APCC, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-128 (filed Mar. 26,2001 and Apr. 23,2001). In the ***ThirdReporr and Order.*** we found the 23.8 cent rate to be a cost-based rare because it would enable PSPs to recover the fixed costs of "marginal" payphones, i.c., payphones deployed at "break-even" locations where a PSP's call revenuesjust barely recover the costs **of** maintaining the payphone. ***Third Reporr and Order,*** ¶¶ 139-41. We estimated that a "marginal payphone" would average 439 calls per-month, including 142 dial-around calls. ***Id.*** at n.302. At the 23.8 cent rate, we determined, the fixed cost of a marginal payphone would he recovered. ***Id.*** at ¶ 191. The 23.8 cent rare, we found, would thereby meet the objective **of** ensuring "widespread deployment of payphone services." 47 U.S.C. §276(b).

[129] *Id.*

[130] *Id.*

[131] Letters from Albert H. Kramer. et. al ,Counsel for APCC, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-128 (tiled Sept. 11,2002) (APCC Sept. 11 **Ex** Parte Letter) at 2-6; Letter From Albert H. Kramer ct al., Counsel for APCC, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-128 (tiled Oct. 4, 2002) (APCC Oct. 4 Bankruptcy Ex Pane Letter), Attachment at 1-2.

[132] APCC Sept. 11 Ex Parte Letter at 7-9 (citing *West Ohio* ***Gas Co. v. Pub.*** *Util. Comm'n of Ohio*, 294 U.S. 79 (1935); *Moss v* ***Civil Aeronautics*** *Bd..* 521 F.2d 298 (D.C. Cir. 1975); *Summerfield v.* ***Civil Aeronautics*** *Bd.*, 207 F.2d 200 (D.C. Cir. 1953); APCC Oct. 4 Bankruptcy Ex Pane Letter at 1-3.

73. Opposing CPA and APCC's arguments, IXCs claim that the Commission has no choice but to order a refund, because 23.8 cents is the lawful rate and because the court of appeals mandated a refund.[133] Additionally, AT&T, Sprint and WorldCom argue that Early Period undercompensation may not be considered because estimates of this liability are speculative, inflated and otherwise unsupportable[134] and because the decision to prescribe Early Period compensation was discretionary with the Commission.[135] IXCs also contend that the equities have been adequately balanced by postponing the date that refunds must be paid to carriers, and dispute CPA and APCC's claims that the carriers overrecovered for the compensation payments they paid during the Intermediate Period.[136] Specifically, AT&T, Sprint and WorldCom argue that IXCs, in fact, underrecovered their costs of paying dial around compensation for several reasons: because they did not receive payphone-specific coding digits from a substantial percentage of payphones during the Interim and Intermediate Periods, they could not impose surcharges on calls originated from these phones and thus were unable to recover the cost of per-phone compensation from end users: when they could impose surcharges, they were unable to recover the administrative cost of payphone compensation and the cost of bad debt; to the extent IXCs have enjoyed lower access charges, these reductions have been passed through to end users; and APCC's arguments regarding general rate increases are speculative, inaccurate, and ignore the fact that IXCs made much broader rate reductions.[137] MCI argued that IXCs were harmed by suppression of demand for dial-around calling caused by the higher compensation rate.[138]

74. AT&T, WorldCom and Sprint also dispute APCC's argument about the impact of recent telecommunications industry bankruptcies. arguing that: APCC's arguments are irrelevant to IXCs that are not in bankruptcy; APCC's arguments would have the effect the effect of forcing certain IXCs to pay more to PSPs to make up for amounts bankrupt IXCs cannot pay, effectively making IXCs guarantors of dial around compensation; and PSPs will, in fact, still be able to setoff Interim Period Compensation owed by bankruptcy companies against rcfiinds and to the extent Interim Period payments are still owed that some recovery is nevertheless possible.[139] These IXCs respond to APCC's arguments that the Commission must consider the impact of the bankruptcies by arguing that the *Third **Report** and **Order,*** at the time it was released, did not ignore the relevant facts at the time the refund was ordered, and that in

---

133 Opposition of Cable & Wireless at 5 (July 7. 1999); AT&T Opposition at 6-7 (July 7, 1999): Letter from Teresa Marrero et al., on behalf of AT&T, WorldCom and Sprint, to Marlene H. Donch, Secretary, Federal Communications Commission, CC Docket No. 96-128 (tiled Oct. 1, 2002) (Joint Oct. 1 Ex Pane Letter) at 2-3.

134 Joint Oct. 1 Ex Pane Letter at 5-7.

135 Letter from Michael DelCasino, AT&T, to Marlene ti. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-128 (tiled June 14, 2002).

136 Opposition of MCI WorldCom Inc. at 6 (July 7, 1999); Opposition of Sprint Corporation to Petition of Colorado Payphone Association Petition for Partial Reconsideration *(MCI Opposition)* at 7-9 (July 7, 1999).

137 Joint Oct. 1 Ex Pane Letter at 7-9; Letter from John E. Benedict, Sprint. to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-128 (filed Sept. 27, 2002) at 1-2; Letter from Larry Fenster, WorldCom, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-128 (filed Oct. 1, 2002) at 2; Letter from Larry Fenster, WorldCom. to Marlene H. Donch, Secretary, Federal Communications Commission, CC Docket No. 96-128 (tiled Oct. 2, 2002) at 2; Letter from Teresa Marrero, AT&T, to Marlene H. Dunch, Secretary, Federal Communications Commission, CC Docket No. 96-128 (tiled Oct. 3, 2002) at 2-3. In addition to these arguments, WorldCom also argues that their underrecovery is further exacerbated because the *Fourth Reconsideration Order* would prevent WorldCom and other carriers from recovering Interim period compensation from their resellers. Letter from Larry Fenster, WorldCom, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-128 (filed Oct. 1, 2002) at 2-3. As we noted above, we have effectively granted Sprint's petition for reconsideration on this point, and as such limited the impact of this alleged underrecovery.

138 MCI Opposition at 6 (July 7, 1999).

139 Joint Oct. 1 *Ex* Parte Letter at 9-11; Letter from Larry Fenster, WorldCom. to Marlene H. Dortch. Secretary, Federal Communications Commission, CC Docket No. 96-128 (tiled Sept. 18.2002) at 1-2.

any event any impact of the bankruptcies is based, at most, on "erroneous predictions regarding the possible impact of these recent bankruptcy proceedings."[140]

b. Discussion

75. Our analysis of this issue begins with the terms of the court's remand in *MCI.* The court announced that it would "exercise [its] discretion to remand the [28.4 cent rate] for further explanation without vacating it."[141] It proceeded to state that:

> Here, vacating the order would leave payphone service providers all but uncompensated for coinless calls made from their payphones, and disrupt the business plans they have made on the basis of their expectation of compensation. . . . We choose not to vacate the $.284 rate *on the clear **understanding** that **if and** when **on remand** the Commission **establishes some different rate of fair** compensation for **coinless payphone calls, the** Commission may **order payphone service providers** to **refund** to **their** customers **any excess charges for** coinless **calls pursuant** to **the current rate**.* The Commission itself has acknowledged that it has the authority to adjust the compensation rate retroactively 'should the equities so dictate.' . . . It is clear that the Commission has the authority to order refunds where overcompensation has occurred, on the basis of the statutory provision permitting the Commission to take such actions 'as may be necessary in the execution of its functions.' . . . In addition, the [1996 Act] requires the Commission to 'take all actions necessary (including any reconsideration)' to promulgate regulations to ensure fair compensation to payphone service providers. This language authorizes the Commission to order refunds where doing so is necessary to ensure fair compensation.[142]

76. In the ***Third Report and Order,*** we cited that holding and concluded that "the current default compensation amount should apply. . . retroactively to the period between October 7, 1997 and the effective date of this order [the period now referred to as the Intermediate Period]."[143] CPA and APCC claim that the court intended the Commission to order refunds only if required by the equities. The IXCs largely retort that the court's remand clearly required the Commission to order refunds in the event that the agency derived a rate lower than 28.4 cents.

77. We believe that the court plainly expected the Commission to order a refund. The court stated its "clear understanding" of that outcome. Although the court stated that the Commission "may," not "shall," order refunds, we think that the word is best interpreted as describing the Commission's power to order the remedy that the court had in mind and not simply as giving the agency an open-ended choice in the matter. The discussion of the Commission's equitable authority was necessary to the court's holding because if the agency lacked any power to order refunds, it would not be able to implement the court's expected remedy. We thus do not read the passage as expressing the view that refunds were to be made only if the Commission found it equitable to do so. Nevertheless, as our power to order refunds is rooted in a measure of equitable discretion, we think it appropriate to examine the equitable arguments raised by the parties. We undertake the inquiry with the understanding that we will enforce the court's expectation of refunds unless the equities make a compelling case to the contrary.

78. This understanding is informed by and consistent with precedent in this area. Although we are constrained from engaging in retroactive ratemaking by ordering refunds of lawful rates already paid. courts have recognized that it is within the discretion of an agency to order a refund when necessary to correct legal error, and even suggested that the equities weigh in favor of refunds in such a situation. Thus, the D.C. Circuit has concluded that "[t]here is . . . a strong equitable presumption in favor of

[140] Joint Oct 1 Ex Parte Letter at 11

[141] *MCI*, 143 F.3d at 609.

[142] *MCI*, 143 F.3d at 609 (citations omitted, emphasis added)

[143] ***Third Report and Order***, 14 FCC Rcd at 2545, ¶¶ 195-196.

retroactivity that would make the patties whole. As [the D.C. Circuit] has stated, 'when the Commission commits legal error. the proper remedy is one that puts the patties in the position they would have been in had the error not been made.'"[144] The D.C. Circuit has more recently stated that "administrative agencies have greater discretion to impose their rulings retroactively when they do so in response to judicial review, that is, when the purpose of retroactive application is to rectify legal mistakes identilied by a federal court."[145] While other cases have indicated that a presumption in favor of refunds might only apply in cases of direct conflict with the explicit requirements of a statute,[146] the *MCI* decision would clearly appear to favor a presumption of a refund for reasons consistent with both lines of cases: first, the court did not vacate the rate because it did not want to leave PSPs "all but uncompensated," but had nevertheless plainly held the rate to be unlawful and took pains to point out the Commission's authority to order a refund in such circumstances; second. the court cited the basic requirements of the Act in noting that the Commission was authorized to order refunds "where doing so is necessary to ensure fair compensation."

79. CPA's principal equitable argument is that the lack of compensation for subscriber toll-free calls during the Early Period justifies overcompensation during the Intermediate Period. The amount of money PSPs did not collect in the Early Period, they assert, far outweighs the amount of refunds to be madc for Intermediate Period overpayment. We find that those circumstances do not provide a strong equitable case against refunds for several reasons, First, as discussed above, the PSPs had no clear entitlement to payment for toll-free calls made during the Early Period. Rather, the governing statute at the time required the Commission only to "consider" such payment. With the passage of section 276, the matter became effectively moot and, as noted above, that matter is now final and not subject to further challenge. Thus, we are not inclined *to* allow **PSPs** to retain the overcompensation of the Intermediate Period. Second, even if the PSPs had established some right to payment, it is impossible to establish with any specificity who owes what to whom for the Early Period.[147] We do not find it equitable to require the carriers that would be due refunds to foot the bill for an amount of money that has been unspecified and unallocated among parties. Third, to require carriers to forego refunds to which they are otherwise entitled because of possible undercompensation in a prior period (as to which the parties had no notice that they could ultimately be held liable) directly implicates the prohibition on retroactive ratemaking, and as such we can place little equitable weight on this factor.

80. CPA also argues that carriers should not receive a refund because they have already recovered from their customers the full 28.4 cent compensation amount, and a refund would amount to double recovery. APCC also argues that IXCs have in fact overrecovered dial around compensation, taking into account general rate increases and the benefit of lower access charges. CPA and APCC have failed to make a compelling case that the refund should be reversed on the basis of alleged recovery or overrecovery. While CPA claims and the record indicates that at least some IXCs recovered per-call compensatioii from their customers in the form of increased rates or surcharges, evidence of this recovery is largely limited to allegations regarding a few IXCs and it is not entirely clear that even these IXCs passed through all compensation. We think it unfair to deny an expected recovery to all carriers because

---

[144] *Exxon Co* ***USA*** *v. FERC,* 182 F.3d at 50 (D.C. Cir. 1999) (quoting ***Public*** *Utilities Comm'n of the State of California* ***v. FERC,*** 988 F.2d 154, 168 (D.C. Cir. 1993)).

[145] *Verizon*, 269 F.3d at 1111

[146] ***See.*** *e.g.,* ***Towns*** *of Concord, Norwood and Wellesley, Massachusetts* ***v.*** *FERC,* 955 F.2d 67, 76 (D.C. Cir. 1992) ("absent some conflict with the explicit requirements or core purposes of a statute, we have refused to constrain agency discretion by imposing a presumption in favor of refunds").

[147] APCC has made industry-wide estimates. and even attempted to break this down among the very largest carriers. *See* Letter from Rohen F. Aldrich. Counsel for APCC, lo Marlene Donch, Secretary, FCC, CC Docker No. 96-128. (May 23, 2002). We note, however, that these estimates were calculated at a very high level and, even if assumed to be reliable, do not provide us with the level of specificity we would need to overcome known and specific refunds owed to IXCs.

of potential. unspecified overrecovery on the part of some.'[148] Regardless of the extent of pass-throughs to customers, however, we think that all of the carriers were reasonably entitled to rely on the *MCI* opinion to form a legitimate expectation that they would receive refunds, and were certainly reasonably entitled to do so after this Commission ordered a refund in the *Third Report and Order.* In a market with unregulated prices, the carricrs were entitled lo charge their customers a surcharge for per-call compensation or, indeed. to raise the retail rate to any level they think the market will bear. But the recovery of the surcharge does not undermine the legitimacy of the expectation that the carriers would eventually recover a refund because they paid an unlawful rate during the Intermediate Period. Carriers may liave set their base rates or made other business plans in reliance on such an expectation. and we will not disturh those expectations hecause of thc possibility of an appearance of double recovery. Indeed, the concept of double recovery is not particularly meaningful in a market where prices are not regulated.[149]

81. With regard to APCC's arguments about overrecovery as a result of general rate increases and reduction of access charges. we again note that APCC's evidence in this regard is limited to a few IXCs. and does not purport to represent equitable factors applicable to the large number of carriers responsible for dial around compensation. Moreover, these arguments by APCC, and rejoinders by IXCs. illustrate very well that it is virtually impossible to come up with a reasonable and equitable resolution by conflating the questions in this proceeding with industry-wide cost recovery and rate questions. While APCC argues that the IXCs have overrecovered because of various benefits from dial around compensation, the IXCs respond that they have underrecovered because they have been unable to pass on payphone-specific surcharges, passed on savings from general access charges, and generally lowered other rates. These kind of universal balancing tests ofamounts that may or may not have been recovered by IXCs provide very little illumination as to whether it is equitable for any given PSP to retain unlawful compensation paid by any given IXC and ignore our repeated statements that because payphone compensation obligations run from specific carriers to specific PSPs,[150] we are not inclined to adopt industry-wide solutions that would obviate specific payment obligations. At most, the under- and ovcrrccovery arguments, most of which were made late in this proceeding, tend to cancel each other out and thus have no bearing on the equitable analysis we conduct here.

82. Finally, the PSPs' failure to recover the entire amount to which they were due during the Intcrmediate Period does not equitably justify allowing the PSPs to keep overpayments made during that time period. The underrecovery may have been due to many reasons: problems in collecting coinpcnsation from resellers: delays in implementing FlexANI technology to facilitate per-call compensation; refusal by some carriers to pay compensation during the Intermediate Period; and so on. The underrecovery does not. however, appear to have been the result of non-payment or significant underpayment by thosc carriers that actually made regular payments ofthe 28.4 cents per-call. In that circumstance. canceling the refund in order to assure greater compensation to PSPs would effectively penalize the very companies who fulfilled their obligations in the first place. That outcome is neither rquitablc nor, in light of the holding in *Illinois* that we may not require one company to bear another one's expenses, lawful. Section 276 requires us to ensure that per-call compensation is fair, which implies fairness to both sides. We take note as well of current litigation in which PSPs are currently engaging against various companies (such as resellers) to recover underpayments during the Intermediate

[148] As APCC points out and as we noted above, the *Third Report and Order* stated that IXCs had recovered the *cost* ofcompensating PSPs at a rate of 28.4 cents per call. We believe the record in this proceeding creates significant questions as to whether the blanket statement in the *Third Report and* Order was correct for all carriers that might have paid Intermediate Period per call compcnsarion – thc Commission did not cite to any support for this assertion and. regardless of what the Commission said regarding cost recovery, nevertheless ordered a refund.

[149] The same reasoning deprives of equitable bearing changes in the types ofcalls made from payphones from less profitable ones (for the IXCs) to more profitable ones.

[150] Which we reaffirm below, *infra* Section III.D 1.a

Period."[151] Any recovery in such lawsuits would mitigate the financial shortfall, and make it even more unfair to require additional payments from the carriers who have already paid their share. To the degree that the payment shortfall was due to problems with FlexANI installation, PSPs are entitled to recover per-phone compensation for any period in which FlexANI was not installed at the LEC switch, which further mitigates the underpayment.

83. In this regard, we reject APCC's arguments that recent telecommunications bankruptcies require us to reconsider our earlier decision to require a refund. As a threshold matter, PSPs have been on notice since the *Third Report and Order* was released in February, 1999, and arguably since the release of the D.C. Circuit's *MCI* decision in 1998, that they would be required to pay refunds as soon as Interim Period compensation was decided. Notwithstanding pending reconsiderations of this decision, no action of this Commission has given PSPs any reasonable basis to believe they would not ultimately be responsible for this payment. Accordingly, to the extent we consider APCC's arguments regarding bankruptcy at all, we give them very little weight given that the bankruptcies in question occurred well after PSPs were on notice that the 28.4 cent rate was unlawful and they would be required to pay a refund. In any event, we do not believe that the bankruptcies justify allowing PSPs to retain overpayments. APCC argues that a shortfall in collection from WorldCom and Global Crossing will necessarily result in actual compensation that falls below the level of compensation the Commission has deemed adequate, which will violate the terms of Section 276. We disagree for several reasons. First, the amount of any shortfall is far from clear and will not be determined until the end of the bankruptcy proceedings. It may turn out that PSPs collect most, if not all, of the money they are owed. It is thus premature for us to allow PSPs to retain overcharges based on the possibility that there might be revenue shortfalls. Second, we agree with the IXCs that reconsidering the refund because of recent bankruptcies, would unfairly shift the burden of paying outstanding Interim Period per-phone compensation to IXCs that paid an unlawful Intermediate Period per-call rate. That outcome would be unfair and inequitable and would violate the principle established in the *Illinois* case. We decline to replace our current system of individual payment obligations with APCC's industry-wide solutions. Third, our actions in the various payphone orders have satisfied the requirements of Section 276. The statute requires us to implement a "per call cornpensation plan" and we have done just that by establishing a per-call rate that has been upheld in court.

84. We are cognizant that the payphone industry has been struggling in light of the pervasiveness of cell phones and that requiring refunds will impose a burden. But we simply cannot say that the burden should be borne instead by carriers (mostly IXCs), who themselves arc suffering from a downturn in their industry. Upon a balancing of the equities, we decline to reconsider our earlier finding that PSPs will be required to pay refunds for the Intermediate Period.

D. Payment Mechanisms

1. Payments Between Carriers and PSPs

85. APCC's Petition for Reconsideration of the *Fourrh Reconsiderurion Order* argues that the Commission must reconsider its decisions to (1) require payments and refunds for the Interim and Intermediate Period to take place between PSPs and carriers and (2) prohibit carriers from exercising self-help remedies by deducting refunds from future payments to PSPs and instead require carriers claiming refunds to bill PSPs.[152] Most of APCC's arguments regarding mechanisms of payment have already been reviewed and decided by the Commission. Nevertheless, we recognize that PSPs should not be placed at an unfair disadvantage in this process, and that unrestrained claims against future payments to PSPs may

---

[151] *See APCC Servs., Inc., v. AT&T Corp.*, No. 99-CV-696 (D.D.C.); *APCC Servs., Inc., v. WorldCom. Inc.*, No. 01-CV-638 (D.D.C.); *APCC Servs., Inc., v Qwest Communs. Corp.*, No. 01-CV-641 (D.D.C.); *APCC Servs., Inc., v. Sprint Communs., Inc.*, No. 01-CV-642 (D.D.C.); *APCC Servs., Inc., v. Cable & Wireless, Inc.*, No. 02-CV-158 (D.D.C.).

[152] See APCC Petition for Reconsideration at 10-16, 16-19 (APCC Petition).

have such an effect. Accordingly, while we deny APCC's petition with regard to both of its arguments, we nevertheless clarify the administration of retroactive payments as set forth below.

86. In the ***Third Report und Order,*** the Commission held that "IXCs may recover their overpayments to the PSPs at the same time as the PSPs receive payment from the IXCs for the Interim Period," and that, if the amount the IXC overpaid is larger than the amount owed to a PSP for the Interim Period. "the IXC may deduct the remaining overpayment from future payments to PSPs."[153] This "true up" was designed to alleviate the immediate impact on PSPs of refunding carrier overpayments without the immediate resources to do so. After adoption of the ***Third Report and Order***, APCC argued that the Commission should not require PSPs to refund overpayments, but should instead order underpaying carriers to compensate carriers that had overpaid during the Interim and Intermediate Periods.[154] The ***Fourth Reconsiderorion Order*** did not disturb the payment mechanisms established under the ***Third Report and Order.*** Instead, it found that APCC's proposal would further complicate resolution of payment for the Interim Period and concluded that, in the absence of any other arrangement made with the agreement of the PSP, "retroactive adjustments are to be made only between carriers and PSPs."

87. APCC's petition for reconsideration of this decision makes two primary arguments. First, APCC argues that it would be unfair to impose a refund obligation on PSPs when they have no assurance of obtaining payments owed for these periods. Thus. APCC argues that

> it is a relatively simple matter for the Commission to determine the amount by which each IXC has been overpaid or underpaid for the Interim Period. Having made that determination, all the Commission needs to do is allocate to each underpaying IXC a pro rata share of the total owed to each overpaying IXC, and rule that the remaining underpayment should be paid to PSPs.[155]

AT&T counters that APCC's proposal exacerbates the problems of determining compensation owed by any given carrier, and Sprint argues that APCC's proposal would significantly increase the administrative difficulty of resolving payments.[156]

88. Second, APCC argues that if the Commission does require resolution of payment between PSPs and carriers, "IXCs should be required lo bill PSPs for the amount of the refund [to the IXC] and await payment, just as PSPs must do when collecting retroactive compensation from IXCs," and further that carriers should be required to verify disputed refund payments.[157] Otherwise, APCC argues, carriers will simply dcduct claimed refunds from future payments to PSPs and will have no incentive to resolve erroneous claims.[158] AT&T, WorldCom and Sprint argue that APCC provides no basis for the Commission to reverse its decision, and AT&T in particular argues that deduction of amounts owed from future payments to PSPs is a common business practice in international settlement arrangements and retail businesses.[159]

[153] ***Third Report and Order*** at 2636-37, ¶ 198

[154] APCC Reply to Comments on Petition for Reconsideration (APCC Reply) at 7 (May **13,** 2002)

[155] APCC Petition at 16

[156] AT&T Comments to Petition for Reconsideration (AT&T Comments) at 4 (May 1, 2002); Sprint Corporation on Petition Tor Reconsideration and Clarification (Sprint Comments) at 9-10 (May 1, 2002).

[157] APCC Petition at 17-18.

[158] *Id.* at 18.

[159] AT&T Comments at 4 (May 1, 2002): WorldCom Inc. Comments on Petition for Clarification and Reconsiderarion (WorldCom, Inc. Comments) at 8 (May 1, 2002); Sprint Comments at 8-10 (May **1,** 2002)

a. Payments Between Carriers and PSPs

89. With regard to APCC's proposal to require underpaying carriers to compensate overpaying carricrs. it is necessary to first point out that APCC's arguments amount to little more than disagreement with a decision that has been made and already affirmed. APCC has already had the opportunity to make its arguments during consideration of the ***ThirdReporr and Order*** and again during the pendency of the ***Fourth Reconsideralion Order.*** APCC and other parties have taken advantage of this opportunity, and the Commission has now held twice that payment and refund obligations for the Interim Pcriod run between PSPs and carriers.

90. While we are thus under no obligation to consider or address yet another iteration of APCC's arguments, we recognize that payment of payphone compensation has a long and complicated history, and in light of APCC's most recent proposal it is useful to clarify the basis for our decision to requirc paymcnts and refunds to take place between PSPs and carriers.

91. APCC is correct in pointing out that resolving payments and refunds among as many as 2.000 PSPs and hundreds of carriers is an extraordinarily complex process.[160] A small number of carriers, however, account for the vast majority of per-call and per-phone compensation owed and payphone clearinghouses provide a mechanism for payment from these carriers to PSPs. Thus, the industry has developed mechanisms to handle compensation, despite the fact that there are numerous carriers and numerous PSPs.

92. In light of these facts, even if we were obligated to consider APCC's proposal, we would reject it. The effect of the ***Fourth Reconsideralion Order*** and this Order is to determine an amount of per-phone compensation and allocate this amount among carriers obligated to pay it. We then leave it to carriers and PSPs to determine the specific amounts of compensation and refunds owed. APCC asks us. essentially. to accept its representations that only one or a very few carriers owe a net refund, and then conclude that we should abandon individual resolution of compensation for the Interim and Intermediate Periods in favor otordering underpaying carriers to make the overpaying carriers whole. APCC's proposal is superficially simple, but ultimately unworkable. APCC's proposal would require us to manage the entire process, as we would need to take our allocation, multiply it by the total number of payphones for which compensation is owed, subtract out compensation each carrier may have already paid, and thus obtain net amounts for each carrier. We simply do not have the record or the resources to allow us to make these determinations. We have insufficient data in the record to allow us to obtain a reliable number of total payphones for which compensation is still owed, and insufficient data in the record that would allow us to determine how much most of the carriers listed on Appendix A may have already paid. Even if we did have sufficient data to do so, APCC makes no suggestion as to how we might equitably allocate payment obligations among underpaying carriers, and instead assumes that we can somehow equitably pro rate payment among carriers.

93. In sum, far from being a "relatively simple matter" to calculate and apply these payment obligations, APCC's proposal would require unprecedented regulatory intervention into the payment process and continuing management of it, is fraught with problems and provides no guarantee whatsoever of finality for the industry. Moreover. PSPs have now been on notice since the release of the ***Third Report and Order*** in February, 1999, that they would be required to offset refunds against compensation owed and have had adequate time to prepare for payment or otherwise settle this obligation. It would be irresponsible for us to discard **this** long-expected mechanism in favor of APCC's poorly-defined alternative.

94. Therefore, we deny APCC's petition for reconsideration to the extent it asks us to establish a carrier-to-carrier mechanism for resolving payments and refunds. We affirm the decisions in the ***Third Report und Order*** and ***the Fourth Reconsideralion Order*** that payment of outstanding

---

[160] **APCC** Petition at 13-14

compensation for the Interim and Intermediate Periods, and payment of refunds, shall be made between carriers and PSPs. We do, however, reitcratc our conclusion in the *Fourth Reconsideration* ***Order*** that we do not prohibit alternative arrangements between or among carriers with the agreement of the PSP.

b. Rendering Claims for Compensation and Refunds

95. In making its proposal that carriers should render bills when they claim refunds from PSPs, APCC argues that the Commission should not allow carriers to take advantage of an offset process.[161] APCC believes such a process would allow carriers to use a self-help rcmcdy of withholding future payments from PSPs, and that the carriers would have no incentive to resolve such disputes in a timely manner.[162] In considering this question, we recognize that PSPs are often at a disadvantage in the per-call compensation process. For example, as we noted above, PSPs often do not have sufficient information to determine which carriers ultimately completes a given call, PSPs are prohibited from blocking calls, and carriers have few incentives at the present time to facilitate the move to a market-determined per-call compensation amount. The clearinghouse systems undoubtedly provide efficient resolution of per-call compensation For hundreds of PSPs, but can also exacerbate the PSPs' disadvantage by facilitating the self-help remedics described by APCC. The carriers commenting in this proceeding arc correct that true ups. and other forms of offset, are an established and efficient means of resolving outstanding payment obligations between parties in commercial relationships. While offsets are thus the most cfficienr way to resolve refunds claimed against PSPs, we remain concerned that, in ordering a resolution of compensation owed for past periods, we may further disadvantage PSPs in obtaining future payments to which they are undoubtedly entitled. While we will not discard offset mechanisms in favor of APCC's proposed solution, we believe it is necessary to clarify how carriers and PSPs should handle the compensation and refund process.

96. Before doing so, however, we note that, aside from APCC's proposal, we have only received a few a comments as to how payment mechanisms might work. For example, the National Payphone Clearinghouse argues that handling past period could take as long as nine months,[163] but we have little information in the record as to how PSPs and carriers might otherwise be able to render payment to one another. IXCs have argued that commercially standard practices should apply but apart from arguing for offsets have not provided many details.[164] Thus, we are at something of a disadvantage in establishing enforceable or effective mechanism for rendering payments. Even assuming a large number of payment, will be made through clearinghouses, payment mechanisms between specific carriers and PSPs may vary significantly and we have no assurance that exhaustive, and probably unrealistic, regulatory requirements will prove to be more efficient or timely than allowing the industry to manage these payments.[165] Nevertheless, we also note that it appears much of the data necessary to calculate amounts owed – for example, the number ofcalls handled by specific carriers, and the PSPs originating the calls – has been available to carriers and clearinghouses for some time, and much of the methodology for compensation was settled by our ***Fourth Reconsiderution Order.*** We thus anticipate that PSPs and carriers will be able resolve these disputes promptly and in the course of business, and note that the continuing obligation to pay interest on amounts owed by **PSPs** lo carriers and vice versa will continue to provide parties with an incentive to render payment in a timely manner.

---

[161] *See* APCC Petition at 17.

[162] *Id.* ***Al*** 18

[163] National Payphone Clearinghouse Comments on Petition for Reconsideration at 3 (May **5,** 2002).

[164] *See. e g* . AT&T Comments at 4

[165] For these reasons, we specifically dccline to requirc payment on compensation to be made within thirty days afier release of this order, as the RBOC Coalition has requested. RBOC Coalition Petition for Reconsideration at 2 (April 3, 2002). It would be unrealistic to impose such a short maximum period for payment when it is possible that not all PSPs, or clearinghouses that handle payments. would be able to calculate and render payment in such a short period oftime.

97. Accordingly, we provide the following guidelines to clarify the requirements of the *Third Report and Order*. As we establish below, this Order will be effective 30 days after it is published in the Federal Register. After this effective date, PSPs and carriers may render bills to one another or otherwise arrange for payment of outstanding Interim and Intermediate Period compensation obligations or refunds. They may use whatever commercially reasonable payment or dispute resolution processes to handle this process they may currently use in their dealings with one another or to which they may otherwise mutually agree, including clearinghouse processes. In accordance with the *Third Report and Order* that "IXCs may recover their overpayments to the PSPs at the same time as the PSPs receive payment from the IXCs for the Interim Period"[166] we clarify that this means IXCs (or other carriers rendering payment) shall initially claim an offset for refunds of overpayments only against amounts claimed by the PSP for Interim and Intermediate Period compensation. Only after the carrier and the PSP have resolved the offset against this amount, "the IXC may deduct the remaining overpayment from future payments to PSPs."[167] We further clarify, however, that IXCs (or other carriers claiming refunds) may only withhold *undisputed* amounts from future payments. Thus. any carrier wishing to deduct a refund out of future payments to PSPs may only do so after providing that specific PSP notice of the refund claimed, and allowing the PSP adequate time to dispute the claim. To the extent a PSP disputes any portion of the refund claimed, the carrier may not deduct that portion from any future payment until it resolves the dispute with the PSP. Again, carriers and PSPs may use existing commercially reasonable processes to handle these disputes and arrange for payment. The only requirement we place on these processes is that if a carrier is able to apply undisputed amounts against future payments, the carriers must allow PSPs to make payments of refunds over a reasonable number of future payments, subject to ongoing accrual of interest, if reasonably requested by the PSP.

98. The above guidelines will help ensure that compensation is fair. We agree with APCC that if we allowed carriers to exercise such a self-help remedy without any restraint, we would place the carriers in a significantly better position in claiming refunds than we have placed PSPs in claiming amounts owed to them since 1996: PSPs will need to claim such amounts from carriers, who will have ample opportunity to dispute amounts owed and apply refunds before making any payment; PSPs would be forced to forego future payments owed for originating calls, and the carrier applying the offset would have little incentive to resolve the dispute in a timely manner. This can hardly be considered fair, and we agree with APCC that the payment process must take account of the possibility and clarify our orders to correct it, while still enabling carriers and PSPs to resolve payments in an efficient manner.

2. Interest Applied to Late Payments

99. In the *Fourrh Reconsideralion Order,* we determined that the IRS-prescribed interest rate should apply to payment of Interim and Intermediate Period compensation. as well as to refunds owed by PSPs to carriers. The RBOC Coalition argues that while we could apply the IRS-prescribed interest rate to refunds, the interest rate necessary to compensate PSPs for compensation delay must be set at a rate that reflects the cost of capital of local exchange carriers, 11.25%.[168] WorldCom, Sprint and AT&T all oppose the RBOC Coalition's argument and argue that the IRS-prescribed interest rate should continue to

100. The Commission fully considered and disposed of this issue in the *Fourrh Reconsiderorion Order*. The RBOC Coalition has provided us with no new information or arguments as to why the rate of return for incumbent local exchange carriers should be applied indiscriminately, when we have clearly acknowledged that payments will flow not only from carriers to LEC-owned PSPs but

[166] *Third Report and Order,* 14 FCC Rcd at 2636, ¶ 198

[167] *Id.* at 2636-37, ¶ 198.

[168] RBOC Payphone Coalition's Reply to Comments on Petitions for Reconsideration of the Founh Order on Reconsideration and Order on Remand (RBOC Reply) at 4-5 (May 13,2002).

[169] AT&T Comments at 3; Sprint Corporation Comments at 2; WorldCom Comments at 10.

also from carriers to independent PSPs and all PSPs to carriers.[170] The Commission's intention by applying the IRS-prescribed interest rate is to reasonably capture the time value of money for all parties owed payment, and not to capture an appropriate rate for return on invested capital. Thus, we deny the RROC Coalition's petition for reconsideration.

101. We do, however, clarify that because wc have reinstated the 0.9 cent interest rate component as described above,[171] the IRS-prescribed interest rate will only begin to accrue after the date payment normally would have been rendered under the quarterly payment system applicable to payphone compensation. Consistent with our assumptions under prior orders,[172] the IRS-prescribed interest rate for payments that should have been madc for the first quarter of the year will begin accruing on July 2 of that same year. for the second quarter of the year on October 2 of that same year, for the third quarter on January 2 of thc next year, and for the fourth quarter on April 2 of the next year.

3. WorldCom Petition Regarding Inmate Calls

102. In the *Fourth Reconsideration Order,* we concluded that PSPs that provided inmate servicc during the Interini Period are entitled to per-call compensation from their presubscribed IXC, assuming they are not otherwise compensated for such calls.[173] According to WorldCom, in contrast to inmate calls not otherwise compensated, "PSPs wrre fully entitled to be compensated for all other types of coinless calls, and were therefore able to comply with the Commission's one-year limit on the submission of compensation claims."[174] The one-year limit referred to by WorldCom is the guideline set forth by the Commission in the *First Report und Order* that "[c]arriers should not refuse payment on timeliness grounds . . . for [claims] submitted by a PSP up to one year after the end of the period in question."[175] Thus, WorldCom asks us to clarify that, with the exception of these inmate calls, PSPs may not now submit any new claims for any other type of coinless call once the one year deadline for submitting calls for compensation has passed.[176] The only conclusion we made with regard to delayed submission of claims for per-call compensation in the *Fourth Reconsideration Order* was that PSPs could claim cornpensation for inmate services rendered during the Interim Period if the PSP was not otherwise compensated. We did not otherwise modify or amend our guidelines that other types of coinless calls should be submitted for compensation within one year. In light of the clear context of our discussion in the *Fourth Reconsideration Order,* it is not necessary for us lo further clarify our holding.

---

[170] Adopting the RBOC Coalition's petition could lead to calculation of a rate for each carrier, depending on the cost of capital of the party paying the interest and the cost of capital of the party receiving the interest. In this situation, there are a number of PSPs who will pay interest for overpayments received for the Interim Period which have a cost of capital higher than 11.25 percent and there may be IXCs who will pay interest for underpayments for the Interim Period which have a cost of capital lower than 11.25 percent.

[171] *See supra* at III.A.4

[172] *Second Report and Order,* 13 FCC Rcd at 1805-06, ¶ 60; *Third Reporr and Order,* 14 FCC Rcd at 2630-31, ¶¶ 188-89; *Fourth Reconsideralion Order,* 17 FCC Rcd at 2032, ¶ 31.

[173] *Fourth Reconsideration Order* at 2031, ¶¶ 27-29.

[174] WorldCom Petition for Reconsideration at 4-5.

[175] *First Report and Order,* 11 FCC Rcd at 20598, ¶ 113.

[176] WorldCom Petition for Reconsideration at 4-5.

4. Asset Valuation and Targeted Blocking

a. Asset Valuation

103. In implementing section 276(b)(1)(B)'s mandate *to* remove subsidies from payphone operations.[177] the Commission required the deregulation of payphone assets.[178] Upon deregulation of payphone assets, LECs are allowed either to maintain their payphone assets in their books of account but reclassify the assets as nonregulated, or to transfer the payphone assets to a structurally separate affiliate.[179] In the *First Report and Order,* the Commission stated that LECs that choose not to transfer their payphone assets to a separate affiliate may maintain these assets on their books at net book value.[180] The Commission further stated that, under its affiliate transaction rules, if a LEC transfers its payphone assets to either a separate affiliate or an operating division that has no joint and common use of assets or resources with the LEC and maintains a separate set of books. the LEC must record the transfer of assets to the separate books at the higher *of* fair market value or net book value.[181] The Commission concluded that fair market valuation will capture any appreciation in value of those assets, "thus ensuring that any eventual gains would accrue to the benefit of the ratepayers and shareholders."[182]

104. In *Illinois*, the D.C. Circuit vacated and remanded the Commission's decision with respect to asset valuation, holding that the Commission's decision to require fair-market valuation of assets transferred to a separate subsidiary violated the principles of *Democratic Central Committee v. Washington Metropolitan Areo Transit Commission.*[183] Specifically, the court held that the Commission's requirement of fair market valuation effected a transfer of the value of shareholder assets to ratepayers. Applying *Democratic Central,* the court held that LEC shareholders were entitled to any increase in value in payphone assets because. under price caps, they had borne the risk of loss associated with them.[184] The D.C. Circuit further held that any transfer of payphone assets to a separate affiliate is a one-time industry reform to which the Commission's asset transfer rules, which are aimed at "on-going" and "systematic" transfers between affiliates, simply do not apply.[185]

105. Three patties filed comments relevant to this issue: the RBOC Coalition; the United States Telephone Association (USTA): and the Competitive Policy Institute (CPI). The RBOC Coalition and USTA support the net book value methodology. In addition to endorsing the court's conclusions, the RBOC Coalition pointed out that the net book value methodology has been used consistently by the Commission when detariffing CPE in the past.[186] The RBOC Coalition also maintains that net book value for one time transfers of payphone assets is required by GAAP and endorsed by the courts.[187] CPI

---

177 Section 276(a)(1) provides that "any Bell operating company that provides payphone service shall not subsidize its payphone service directly or indirectly from its payphone service directly or indirectly from its telephone exchange service operations or its exchange access operations." 47 U.S.C. § 276 (a) (1). Subsection (b) of § 276 requires the Commission to issue "regulations that... discontinue... all intrastate and interstate payphone subsidies from basic exchange and exchange access revenues." Id. U.S.C. § 276 ((b)(1)(B).

178 *See First Report and Order*, 11 FCC Rcd at 20611-14, ¶¶ 142-145

179 47 C.F.R. § 32.27(b).

180 *First Report and Order*, 11 FCC Rcd at 20623-20628, ¶ 163.

181 *Id.*, at 20624, ¶ 164.

182 *First Report and Order,* 11 FCC Rcd at 20625, ¶ 165.

183 485 F.2d 786, 806 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 935 (1974).

184 *Illinois,* 117 F.3d at 570.

185 *Id*

186 RBOC/GTE/SNET Payphone Coalition Comments *at* 40 (Aug. 26, 1997).

187 *Id.*

contends that the Commission correctly decided that payphone assets that are transferred to a separate affiliate be transferred at the higher of net hook value or fair market value.[188] CPI also contends that the court relied on an "imperfect understanding of how price caps function" and thus incorrectly concluded that price caps shift the risk from the ratepayers to the shareholders.[189] CPI lists five attributes of price cap regulation which, in its judgment, undermine the court's view that the advent of price cap regulation shifts the risk of loss entirely to shareholders.

106. Whatever the merits of CPI's arguments might be, we are constrained by the currently applicable holding of the D.C. Circuit to apply net hook value. The court could not have been clearer that the Commission's affiliate transaction rules do not apply to the transaction in question, and also could not have been clearer that the potential risk borne by shareholders requires use of net book value under *Democratic* ***Central.*** The court's holding, however, was set forth in the specific context of the transfers at issue iii the ***First Report and Order.*** Thus, to avoid confusion as to the reach of our implementation of the court's decision, we provide clarification as follows. If a LEC chooses to retain payphone assets, reclassification of these assets from regulated to nonregulated status must he consistent with section 32.32 and our Part 64 cost allocation rules. If a LEC chooses to make a one-time transfer of payphone assets to a nonregulated affiliate or operating division, then such a transfer would he recorded at net book value.[190] We expressly limit this treatment to only such transfers as may he made pursuant to our implementation of section 276(b)(1)(B), as it is only these types of transfers that could reasonably be considered the kind of one time industry reform contemplated by the D.C. Circuit.[191]

b. Targeted Blocking

107. As the Cornmission explained in the Third Report and Order, "targeted call blocking refers to the technological ability of an IXC to not accept (or 'block') a dial-around access code call from one payphone while accepting calls from another payphone."192 In its Petition for Reconsideration of tlie ***Third Report and Order,*** CPA argues that the Commission erred when it did not require IXCs to implement targeted call blocking.'" Because CPA raises no new evidence or arguments not already considered, we deny CPA's petition on this issue.

10S. CPA argues that the Commission failed to take a "critical step" towards realizing its goal of a deregulated market for per-call compensation, and should have required IXCs to implement targeted call blocking.[194] CPA argues that even if targeted call blocking would impose huge costs on IXCs, the Commission was nevertheless '-required" to order IXCs to implement targeted call blocking because the

---

188 Competitive Telecommunications Association Comments at 9 (August 26, 1997).

189 *Id.*

190 We note that, at this point. this holding may have little practical effect. Historically, payphone assets comprised less than 1 per cent of a LEC's physical plant. Today, that percentage has continued to shrink due in large pan to the dramatic growth of wireless alternatives. SBC Communications, parent of several large phone companies and Qwest Communications. parent of US West, have over the past few years tried to sell their payphone divisions. When no buyers emerged, the companies resorted to hiking the cost a local call to as much as 50 cents, and both are rapidly removing unprofitable phones. Not too long after Bell South Corp. transferred its payphone assets to a separatr affiliate. the RBOC announced it was gening out of the payphone business no later than 2003.

191 To the extent a transfer of payphone assets does not meet these requirements, the Commission's affiliate transaction rules would apply. In this event, we take this opportunity to remind carriers that they should include in fair market valuations of payphone assets the going concern value associated with location contracts supporting the payphone assets. *See First* ***Report*** *and* ***Order,*** 11 FCC Rcd at 20624-25, ¶ 164; ***Firsf Reconsiderorion Order,*** 11 FCC Rcd at 21315-317, ¶¶ 181-87.

192 ***Third Report and Order***, 14 FCC Rcd at *2571* n. 103.

193 **CPA** Petition at 17-19.

194 CPA Petition at 16-19.

Commission found the technology "feasible" and "necessary to achieve a market solution," and "because it is crystal clear that the IXCs lack any incentive to make it happen on their own."[195] IXCs have responded that targeted call blocking would impose significant costs on the industry, and Sprint argues that such a requirement is beyond the scope of this proceeding."[196]

109. As is made clear from the *Third Report and Order,* CPA raises no new arguments or evidence sufficient to convince us that we should now impose targeted call blocking in response to its petition. The Commission was clearly aware that targeted call blocking existed at the time of the *Third Report and Order* and discussed the costs, incentives and market dynamics related to this technology and per-call compensation in exhaustive detail. After considering all of these factors, we did not impose any specific obligation to deploy this technology. CPA has not made any novel argument it could not have made during our consideration of the *Third Report and Order,* nor has CPA presented some new piece of evidence not previously available that would warrant reconsideration.

IV. PROCEDURAL MATTERS

A. Effective Date

110. In publishing the *Fourth Reconsideration Order* in the Federal Register the Commission adopted an effective date of January 1, 2003, although the text of the *Fourth Reconsideration Order* omitted this date. Several parties take issue with this effective date and have petitioned for reconsideration or clarification of this date.[197] To the extent that this omission created any confusion, we now clarify that the effective date of the *Fourth Reconsideration Order* and this Order shall be 30 days after the date that this Order is published in the Federal Register.

111. Accordingly, the requirements of the *Fourth Reconsideration Order* and this Order, when they take effect, will obligate carriers and PSPs to render compensation and refunds to one another for past periods. We are sensitive to the concerns of carriers that in setting an effective date, the Commission should allow sufficient time to manage the task of determining what amounts are to be paid to each PSP.[198] We are, however, also sensitive to the fact that the compensation questions flowing from this Order have been pending at the Commission for some time. Moreover, there is no reason to prevent a PSP from calculating and rendering a bill for compensation if it is able to do so shortly after this Order is published. Indeed, allowing PSPs to do so will significantly advance the common interest of the Commission and all parties to this proceeding in accelerating resolution of payment for these periods. Furthermore, with the release of the *Fourth Reconsideration Order,* parties were put on notice that an allocation of financial responsibility would be forthcoming from the Commission. Thus, the obligations established in this Order should not constitute any kind of surprise for affected parties. For these reasons, we decline to defer the effective date of the compensation established in this Order until all Commission and court review is completed.[199] Thus, once any PSP or carrier has performed the tasks necessary to render bills for compensation or refunds in accordance with this Order, the PSP or carrier may render such bills as soon is practicable after the effective date of this Order, provided that they observe the guidelines for resolution of offsets as set forth above.[200]

---

[195] CPA Petition at 7-8.

[196] Sprint Comments at 6-7; AT&T Comments at 6.

[197] RBOC Reply at 6 (requesting that the Commission "revise the effective date of the order" to include compensation "as soon as possible"); Sprint Comments at 5; WorldCom Comments at ii.

[198] Sprint Comments at 5.

[199] APCC Reply at 10.

[200] *See supra* at III.D.1 b

B. Final Paperwork Reduction Act Analysis

112. This decision has been analyzed with respect to the Paperwork Reduction Act of 1995. Pub. L. 104-13, and it contains no new or modified information collections subject to Office of Management and Budget review.

C. Supplemental Final Regulatory Flexibility Act Analysis on Reconsideration

113. Pursuant to the Regulatory Flexibility Act of 1980, as amended, ***see*** 5 U.S.C. § 604, the Commission's Supplemental Final Regulatory Flexibility Analysis for this order is attached as Appendix G.

V. ORDERING CLAUSES

114. Accordingly, pursuant to the authority contained in 47 U.S.C. §§ 151, 154, 201-205, 215, 218, 219.220. 226, 276 and 405, IT IS ORDERED that the policies, rules and requirements set forth herein ARE ADOPTED.

115. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Inforination Center. SHALL SEND a copy of this Fifth Order on Reconsideration and Order on Remand, including the Supplemental Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Marlene H. Dortch
Secretary